156

CLERK'S COPY.

Volume 15

TRANSCRIPT OF RECORD

19543

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 23

FEDERAL TRADE COMMISSION, PETITIONER,
vs.
THE CEMENT INSTITUTE, et al.

No. 24

FEDERAL TRADE COMMISSION, PETITIONER,
vs.
ÆTNA PORTLAND CEMENT COMPANY, et al.

No. 25

FEDERAL TRADE COMMISSION, PETITIONER,
vs.
MARQUETTE CEMENT MANUFACTURING COMPANY

No. 26

FEDERAL TRADE COMMISSION, PETITIONER,
vs.
CALAVERAS CEMENT COMPANY, et al.

No. 27

FEDERAL TRADE COMMISSION, PETITIONER,
vs.
SUPERIOR PORTLAND CEMENT COMPANY

No. 28

FEDERAL TRADE COMMISSION, PETITIONER,
vs.
SUPERIOR PORTLAND CEMENT, INC.

No. 29

FEDERAL TRADE COMMISSION, PETITIONER,
vs.
NORTHWESTERN PORTLAND CEMENT COMPANY

No. 30

FEDERAL TRADE COMMISSION, PETITIONER,
vs.
RIVERSIDE CEMENT COMPANY

No. 31

FEDERAL TRADE COMMISSION, PETITIONER,
vs.
UNIVERSAL ATLAS CEMENT COMPANY

No. 32

FEDERAL TRADE COMMISSION, PETITIONER,
vs.
CALIFORNIA PORTLAND CEMENT COMPANY

No. 33

FEDERAL TRADE COMMISSION, PETITIONER,
vs.
MONOLITH PORTLAND CEMENT COMPANY, et al.

No. 34

FEDERAL TRADE COMMISSION, PETITIONER,
vs.
GLADDEN S. SMITH, et al.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 20, 1947
CERTIORARI GRANTED MARCH 10, 1947

INDEX TO VOLUME 15.

Pages 10791 to 11608.

TRANSCRIPT OF TESTIMONY.

Colloquy 10822, 10866, 11528, 11545

WITNESSES FOR RESPONDENTS (CONTINUED).

Testimony of:

Alexander, M. Moss 11217
Browder, D. S. 11520, 11534, 11549
Elcock, W. B. 11340
Horner, Charles 11144
Letzkus, L. C. 11415
MacDonald, B. A. 11009
McCracken, James F. 11108
McGovern, E. W. 10874
Nelson, J. L. 10791, 10836

(Testimony of Witnesses contained in pages 35868 to 38270 of the Original Transcript.)

35868 J. L. NELSON was thereupon called as a witness for the Respondents, and, having been first duly sworn, testified as follows:

35871 It is hereby stipulated that if John L. Nelson, Vice-President and Sales Manager of the Wolverine Portland Cement Company (hereinafter referred to as "Wolverine" or as the "Company"), were to testify on his direct examination with respect to the matters hereinafter indicated, he would give as his testimony with respect to those matters the statements hereinafter set forth.

35872 Background of the witness:

I became associated with the cement industry in February, 1906, as an employee of the Sales depart-
35873 ment of the Cement Department of the Illinois Steel Company. I was located at Chicago, Ill. The Cement Department soon became a separate corporation under the name of the Universal Portland Cement Company.

In 1907 I went to Pittsburgh as assistant to the Eastern Sales Manager of the Universal Portland Cement Company.

In 1915 I became assistant to the General Sales Manager and was located at Chicago. Later I also became assistant to the vice-president. I continued in these positions until I left the company in 1928.

In 1928 I became associated with the Cowham Engineering Company.

In February, 1934, I was employed by the N.R.A. Code Authority for the Cement Industry for the purpose of handling price filings pursuant to the N.R.A. Code for the Cement Industry.

On the termination of the N.R.A. Code in May, 1935, I continued my work in filing prices under the Trade Practice Committee. This continued until later in that year when price filing was discontinued.

In February, 1936, I became sales manager of the Wolverine Portland Cement Company and have remained associated with that company ever since. Since January 26, 1937, I have been vice-president and general sales manager.

35874 Early price history at Chicago:

It is my recollection that in 1906, when I became associated with the Cement Department of the Illinois Steel Company, we were meeting the destination prices of our competitors, the most important of which were the mills around LaSalle, the Atlas mill at Hannibal, and the mill in St. Louis operated by the predecessor of the Missouri Portland Cement Company. These mills served the same territory served by our Buffington mill. It is my recollection that we gave each salesman a minimum figure below which he was not allowed to quote, and we tried to secure a satisfactory net at our mill based on the daily average mill net which we were then receiving.

At that time I do not recall any requests for f.o.b. mill prices. We gave each salesman the freight rates from our mill and competitive mills to points in his territory so he could quote delivered prices.

In so far as the territory around Chicago was concerned, competing cement companies appeared to be employing a somewhat similar method in arriving at the prices which they would quote to customers at a given destination.

At that time in the area around Chicago there was no practice of sending out broadcast quotations to the dealer and contractor trade.

Early price history at Pittsburgh:

35875 I went to Pittsburgh in May, 1907, at which time the Universal Portland Cement Company was building a plant at Universal, Pa., just outside of Pittsburgh and referred to as the Pittsburgh or Universal mill. My work was under the direction of the eastern sales manager and consisted in organizing the sales office and sales force, building up the mailing lists of prospective customers for our advertising and getting ready to do business when the plant at Pittsburgh was opened and ready for shipments.

The plant at Universal was built to use the slag from the Carnegie Steel plant, to take advantage of the cement prices in the Pittsburgh and Ohio territory and because of its advantageous location freightwise to the Ohio and Western Pennsylvania markets as compared with the Lehigh Valley mills.

The Pittsburgh plant produced the first clinker about Thanksgiving 1907. The first cement shipments were made in the early part of 1908. From the Universal mill at Pittsburgh we solicited and endeavored to sell Universal

cement at destinations east of the Indiana-Ohio line, south of the Michigan-Ohio line and to destinations in the eastern and southeastern United States where we could receive a satisfactory net on our sales. Sales west of this territory were handled by the general sales office in Chicago. Shipments to eastern territory were usually made from Universal and in the West from the mill at Buffington, Indiana.

35876 Prior to the time the plant was in operation, a small amount of cement was shipped to Pittsburgh for the purpose of demonstrating to dealers and contractors the type of cement which we were going to manufacture.

We found that there was some consumer prejudice against Universal cement since slag was used in its manufacture. We found it necessary to educate the customers to the fact that Universal cement was a true Portland cement of high quality and equal to any of the brands then being sold in that market and thereby to remove the prejudice which had been created by our competitors. Representatives of the Lehigh Valley companies in innumerable cases helped to create this prejudice by claiming Universal cement was a puzzolan or slag cement, which is an entirely different product. They also claimed that true Portland cement could not be made from slag, but had to be made from stone coming from the Lehigh Valley. Because of this prejudice against our cement, the price for Universal cement of necessity had to be at least as low as that quoted by any of our competitors whether sold direct by the manufacturers or through distributors.

In contacting prospective customers, dealers, consumers, etc., the salesmen learned from the trade what prices they had been paying, and the terms and conditions of sale then in use. We found that delivered prices were usually quoted at various points in the Pittsburgh area and

35877 that they tended to conform to a uniform net at the Lehigh Valley mills plus the freight rate from the Lehigh Valley district. This did not leave us any lee-way in quoting delivered prices above the figure which the Lehigh Valley mills were quoting. We found that up to the time the Pittsburgh mill was built, the Pittsburgh market was generally supplied by the Lehigh Valley mills, but that there were also mills at Middle Branch, Baybridge, and Castalia, Ohio, Wampum and New Castle, Pa., Ford-

wick, Va., and Manheim, W. Va. We did not find any customers in the Pittsburgh market who requested prices f.o.b. our mill or f.o.b. Lehigh Valley mills and we found that they were requesting delivered prices.

At the time the Pittsburgh plant started, some of the companies located in the Lehigh Valley were making their sales in the Pittsburgh area by means of distributors. We found that those distributors sold solely on the delivered price basis.

When we first started to sell from our mill at Pittsburgh, we did not broadcast quotations to the purchasing trade. Prices were quoted by letter, by our salesmen and upon specific request. We did, however, confirm the verbal quotations made by our salesmen. As I recall it, about 1910 we commenced the practice of broadcasting quotations to our customers and prospective customers.

The first sales we made at Pittsburgh were made
35878 on a delivered price basis. I do not recall that we were ever asked for an f.o.b. mill price, nor that we had a policy against selling to any one on an f.o.b. mill basis had we been requested to do so. We were asked by customers for delivered prices.

It took us some time to break into the Pittsburgh market. At that time our sales were made at the same price as was being obtained by the Lehigh Valley mills. About the time we became well established one of the companies in the Lehigh Valley reduced its prices in the Pittsburgh area. Universal met these price reductions. The Lehigh Valley mills then sold at delivered prices, reflecting a higher net in eastern Pennsylvania than in the West. Other reductions followed and the meeting of such reductions by Universal was repeated until the Lehigh Valley net which was used on sales in Pittsburgh area was the same as that used on sales in the East. As prices were reduced, Universal extended its sales effort east and quoted and sold at delivered prices with a net equal to the Lehigh Valley net which the Lehigh Valley mills had used on sales in Pittsburgh, western Pennsylvania and Ohio.

As competition by Universal continued and the prices were reduced by Lehigh Valley mills, we found that the companies in the Lehigh Valley eliminated their distributors and were making their sales direct in the Pittsburgh market. We also found that the Lehigh Valley com-
35879 panies took over the marketing practices and methods employed by their distributors and quoted and

sold at delivered prices in our trade territory. Most of these distributors then became local dealers.

As our sales efforts became more intense and business increased the Lehigh Valley mills were able to get a smaller percentage of the business in the Pittsburgh area. As freight rates increased and because of our service advantage, we were able to increase our percentage of the tonnage and the Lehigh Valley mills were able to get less and less tonnage in the vicinity of our mill.

By 1913 the Lehigh Valley mills were forced to meet our competition in western Pennsylvania and Ohio at which time we quoted our prices based on a figure at our mill plus the rail freight rate.

History of quotations issued by the Pittsburgh office:

I have no specific recollection as to what prices were quoted in 1908 and 1909 by the Pittsburgh office of the Universal Portland Cement Company. I can testify, however, from records made by me or under my supervision at the time as to the prices starting on April 10, 1910. These records were kept by me and show the dates when we issued quotations to the dealer trade. These records show the following:

On April 10, 1910, May 13, and May 16, 1910, quotations were mailed to prospective customers east of the 35880 county line on the basis of 73 cents, Lehigh Valley.

The county line (hereinafter referred to as the line), is the western boundary of Monroe, Livingston and Steuben Counties in New York State and the western boundary line of Potter, Clinton, Center, Huntington, and Franklin Counties of Pennsylvania.

On April 22, 1910, and May 13 quotations were mailed to customers west of the county line on basis of 60 cents, Lehigh Valley.

On May 18 and May 19, 1910, quotations were mailed to customers west of line on the basis of 65 cents at the Lehigh Valley.

On May 24, 1910, quotations were mailed on the Lehigh Valley basis of 78 cents east of the line and 70 cents west of the line.

On June 13, 14, and 15, 1910, quotations were mailed on the Lehigh Valley basis of 75 cents west of the line.

On July 14 and 15, 1910, quotations were mailed on the Lehigh Valley basis of 85 cents east of the line. Uni-

versal held to a minimum mill net of 68 cents at its mill. This minimum was raised to 70 cents on July 29th.

On August 9, 1910, quotations were mailed on the Lehigh Valley basis of 70 cents west of the line.

On September 8 quotations were mailed on the Lehigh Valley basis of 70 cents for Ohio.

35881 On September 12 all other points west of the line were quoted on a 70-cent Lehigh Valley basis.

On October 1 and 3, 1910, quotations were made on 65 cents at Lehigh Valley for destinations west of the line. Universal used a minimum net of 70 cents. Quotations were not made to Buffalo, Niagara Falls, Kentucky, and Maryland.

On January 6, 1911, quotations were made on a 60-cent basis at the Lehigh Valley for destinations in Ohio, Universal holding to a minimum of 75 cents.

On January 7, 9, and 10 quotations were made on a 65-cent basis at the Lehigh Valley for destinations west of the county line to the neutral line until the Pittsburgh net reached 70 cents, then on a 60-cent basis at the Lehigh Valley, with 70 cents minimum still holding. The neutral line referred to is the line running through destinations which carried the same freight rates from both the Lehigh Valley and from the Universal mill at Pittsburgh.

On February 10 and 11 quotations were made on the basis of 65 cents at the Lehigh Valley for destinations in Ohio.

On February 12 quotations at West Virginia points were also made on a 65-cent Lehigh Valley basis.

On February 13 quotations in Pennsylvania east and west of the line, Maryland, New York, New England,

35882 were made on a basis of 65 cents Lehigh Valley with minimum of 65 cents at Pittsburgh mill.

On March 2, 1911, quotations were made reflecting a 70-cent Lehigh Valley basis for destinations east of the county line with 70 cents minimum Pittsburgh.

On March 16, 1911, quotations were made at points east of the line at a 5-cent disadvantage and over 65 cents Pittsburgh. (I believe that quotations east of the line were 5 cents over market but their minimum at Pittsburgh was over 65 cents.)

March 31, 1911, quotations east of neutral line were restricted to a 70-cent minimum at Pittsburgh.

April 17, 1911, quotations were made to all the territory.

These reflected 65 cents Lehigh Valley basis west of the line; 65 cents minimum at Pittsburgh for points east of the line; 70 cents minimum at Pittsburgh between neutral and county lines in New York; minimum of 72 cents at Pittsburgh in New York west of the line and 74 cents minimum at Pittsburgh between county line and neutral line in Pennsylvania. Quotations in the West were on 65 cents Lehigh Valley, same for the East, but holding to 65 cents minimum Pittsburgh with a 70-cent minimum in New York State, in territory between neutral and county lines and with a minimum of 72 cents west of neutral line. In Pennsylvania holding to a 74-cent minimum between neutral and county lines with a minimum of 65 cents
35883 east of neutral line.

May 2 and 3, 1911, quotations made on a 70-cent minimum Pittsburgh, east of neutral line, and in Ohio on 70-cer Lehigh Valley basis.

May 12 and 13 destinations in Ohio were quoted on a 65-cent Lehigh Valley basis.

June 13 destinations in West Virginia were quoted on a 60-cent Lehigh Valley basis; east of line Pittsburgh held to a 65-cent minimum.

June 21 and 22 New York, Ohio, and Pennsylvania, west of the line were quoted on the basis of 60 cents at Lehigh Valley.

June 27 West Virginia quoted on the basis of 55 cents at the Lehigh Valley.

On July 7, 1911, all prospective dealers quoted.

July 13-14, Ohio was quoted on the basis of 55 cents at the Lehigh Valley. Kentucky was quoted on the basis of 75 cents at Mitchell, with minimum of 60 cents at the Pittsburgh mill for points in Kentucky.

July 13, 1911, west of line Pennsylvania, New York, and Maryland were quoted on the basis of 55 cents at the Lehigh Valley.

July 25, 1911, east of line wa. quoted on the basis of 65 cents at the Lehigh Valley with a minimum of 60 cents at Pittsburgh.

35884 On August 1, 1911, all New York and Ohio dealers quoted.

August 30, 1912 (I believe this should be August 30, 1911), Ohio was quoted on the basis of 80 cents at Mitchell, where the prices were lower than 55 cents Lehigh Valley.

This means that Mitchell or Lehigh Valley made the price in Ohio, whichever gave the lowest delivered price.

September 21, 1911, prices west of county line, were quoted on the basis of 50 cents at the Lehigh Valley with minimum of 60 cents at Pittsburgh, and prices east of county line were quoted on the basis of 60 cents at the Lehigh Valley with a minimum of 55 cents at Pittsburgh.

On September 29, 1911, prices quoted to Ohio, New York, Pennsylvania, and Pittsburgh dealers.

October 13, 1911, prices were quoted on and east of neutral line with minimum of 55 cents at Pittsburgh to all points.

November 8, 1911, prices west of county line, were quoted on the basis of 45 cents at the Lehigh Valley with 55 cents minimum at Pittsburgh; prices in Ohio and Kentucky were quoted on the basis of 70 cents at Mitchell where lower than 45 cents Lehigh Valley.

November 9, 1911, prices in Tennessee east were quoted on the basis of 65 cents at Mitchell, with a minimum of 55 cents at Pittsburgh.

35885 November 27, 1911, the minimum at the Pittsburgh mill to points west of the line was raised to 60 cents.

February 12, 1912, prices west of county line were quoted on the basis of 50 cents at the Lehigh Valley.

March 25, 1912, prices east of neutral line were quoted with a minimum of 60 cents at Pittsburgh, and at points between the neutral and county lines on a basis of 60 cents at the Lehigh Valley.

March 28, 1912, prices west of county line were quoted on a basis of 50 cents at the Lehigh Valley or a basis of 70 cents at Mitchell, with a minimum of 60 cents at Pittsburgh.

April 2, 1912, prices west of county line were quoted on the basis of New Castle 75 cents, Mitchell 75 cents, Manheim 75 cents, Lehigh Valley 55 cents.

April 22, 1912, prices were quoted on the basis of Mitchell 80 cents, New Castle 80 cents, Lehigh Valley 55 cents. The price was on the basis of whichever figure plus freight was the lowest.

On May 1, 1912, prices were quoted to dealers in Ohio, West Virginia, Western Pennsylvania, Western Maryland, New York, and Pittsburgh.

June 5, 1912, quotations were mailed to Ohio and Pennsylvania on the basis of 55 cents at the Lehigh Valley, 80

cents at Stroh, 80 cents at Mitchell, 75 cents at Manheim.

35886 June 27, 1912, all territory quoted on the basis of 58 cents at Lehigh Valley or 85 cents at Mitchell. The dealers within switching limits with 11-cent limit on freight rate quoted on 93 cents Pittsburgh.

July 12, 1912, Ohio destinations quoted on the basis of 85 cents at Stroh.

July 19, 1912, west of line quoted on the basis of 60 cents at the Lehigh Valley.

July 22, 1912, west of line quoted on the basis of 63 cents at the Lehigh Valley, 90 cents at Stroh, 90 cents at Mitchell.

July 24, 1912, east of line the minimum at Pittsburgh was advanced to 65 cents.

July 25, 1912, prices between neutral and county lines were quoted on the basis of 65 cents at Lehigh Valley.

July 26, 1912, quotations to Pittsburgh dealers were quoted on the basis of 59 cents at the Lehigh Valley.

July 29, 1912, New York was quoted on the basis of 68 cents at the Lehigh Valley, east of line was quoted on the basis of 65 cents on the Lehigh Valley.

August 8, 1912, quotations west of line were quoted on the basis of 65 cents at the Lehigh Valley.

August 20, 1912, Ohio was quoted on the basis of 95 cents at Mitchell. Hamilton County was quoted on the basis of 85 cents at Mitchell.

35887 August 27, 1912, prices east of neutral or equal freight lines quoted with a minimum of 70 cents at Pittsburgh; between the county and neutral lines, also quoted with a minimum of 70 cents at Pittsburgh.

August 29, 1912, prices quoted on the basis of 90 cents at Stroh, Mitchell 95 cents, Lehigh Valley 68 cents. On prices east of the line there was a minimum of 70 cents at Pittsburgh.

September 3, 1912, prices east of line were quoted on the basis of 75 cents at the Lehigh Valley and 73 cents west of line, Stroh 95 cents, Mitchell $1.00. The prices were quoted with a minimum at Pittsburgh of 75 cents.

September 9, 1912, prices west of line were quoted on the basis of 75 cents at the Lehigh Valley, 75 cents east of line, Stroh $1.00, Mitchell $1.00. The prices were 5 cents up for all contract work for delivery prior to November 15, 1912.

September 13, 1912, prices quoted on the basis of 80 cents at the Lehigh Valley, Stroh $1.05, Mitchell $1.05. There was at Pittsburgh a minimum of 80 cents.

September 21, 1912, prices were quoted on the basis of $1.10 at Mitchell and $1.10 at Stroh.

November 25, 1912, prices west of line and between lines were quoted on the basis of 70 cents at the Lehigh Valley, 95 cents at Stroh and 90 cents at Mitchell.
35888 There was at Pittsburgh a minimum of 80 cents. For shipment after November 15, 1912, prices were quoted on the basis of $1.00 at Stroh, $1.00 at Mitchell, 75 cents at Lehigh Valley.

January 25, 1913, prices west of county line were quoted on the basis of 70 cents at the Lehigh Valley, 90 cents at Mitchell, 95 cents at Stroh.

February 3, 1913, prices on future jobs were quoted on the basis of 92 cents at Mitchell.

February 7, 1913, prices were quoted on the basis of 70 cents at the Lehigh Valley, 95 cents at Mitchell, 95 cents at Stroh. There was at Pittsburgh a minimum on 30 day shipments of 80 cents. The Pittsburgh minimum on futures was 85 cents.

February 8, 1913, all futures 5 cents higher than regular delivered prices.

February 13, 1913, quotations were made on the basis of 75 cents at the Lehigh Valley. Futures were quoted on the basis of 75 cents at the Lehigh Valley, $1.00 at Stroh, $1.00 at Mitchell.

February 19, 1913, current prices were quoted on the basis of 75 cents at the Lehigh Valley, $1.00 at Stroh, $1.00 at Mitchell. Futures were quoted on the basis of 75 cents at the Lehigh Valley, $1.05 at Stroh, $1.05 at Mitchell.

February 24, 1913, current prices were quoted on the basis of 75 cents at the Lehigh Valley, $1.00 at
35889 Stroh, $1.00 at Mitchell. Futures were quoted on the basis of 80 cents at the Lehigh Valley, $1.10 at Stroh, $1.10 at Mitchell.

March 3, 1913, current prices were quoted on the basis of 80 cents at the Lehigh Valley, $1.05 at Stroh, $1.05 at Mitchell. There was a Pittsburgh minimum of 80 cents. The Pittsburgh District present and future prices were quoted on the basis of 75 cents at the Lehigh Valley. Future prices were quoted on the basis of 80 cents at the Lehigh Valley, $1.10 at Stroh, $1.10 at Mitchell. There was a 90-cent minimum at Pittsburgh on futures.

March 6, 1913, prices east of county line were quoted on the basis of 85 cents at the Lehigh Valley. There was at Pittsburgh an 80-cent minimum on current, and a 90-cent minimum on futures.

On March 17, 1913, prices current and future were quoted on the following basis:

	Current	Futures
Lehigh Valley east of line	$ .88	$ .88
Lehigh Valley west of line	.80	.85
Stroh	1.05	1.10
Mitchell	1.10	1.15
Pittsburgh minimum	.80	.95

On March 18, 1913, prices in the Pittsburgh District were quoted on the basis of 80 cents (85 cents futures) at the Lehigh Valley except to customers in the 7 cents
35890 and under switching area. In the 7 cents and under area prices were quoted on the basis of 75 cents (80 cents futures) at the Lehigh Valley. My recollection is that the 7 cents refers to a switching rate.

March 19, 1913, prices were quoted raising the minimum on current to 85 cents Pittsburgh, east and west.

March 24, 1913, prices in all territory in Pittsburgh District including Pittsburgh, were quoted on the basis of 80 cents at the Lehigh Valley current (85 cents on futures).

April 15, 1913, prices quoted in Ohio on the basis of $1.10 at Stroh current and $1.10 on futures.

May 5, 1913, quotations mailed for all territory west of line on the basis of 80 cents at the Lehigh Valley, $1.10 at Stroh, $1.10 at Mitchell, in New York, west of line on 85 cents at the Lehigh Valley, east of line on 90 cents at the Lehigh Valley with a Pittsburgh minimum of 85 cents.

May 16, 1913, prices quoted on the basis of 85 cents at the Lehigh Valley for current business.

August 7, 1913, and September 23, 1913, prices mailed to all territory at previous figures.

October 27, 1913, quotations quoted to all dealers on the basis of $1.10 at Mitchell, $1.00 at Universal, $1.05 at Stroh, 85 cents at the Lehigh Valley. There was a minimum at Pittsburgh of 85 cents. Prices to Ohio consumers were 5 cents more. Consumers in other territory
35891 always more than dealers' price.

December 6, 1913, prices quoted on the basis of $1.00 at Stroh.

December 16, 1913, prices quoted on the basis of $1.00 at Mitchell.

January 29, 1914, prices east of line were quoted on the basis of 90 cents at the Lehigh Valley with a Pittsburgh minimum of 85 cents; consumers prices were 5 cents higher.

History of rate books:

When I went to Pittsburgh in 1907, we did not have any freight rate books of any description. We had a traffic department which worked up, in card form, the rate information to all towns where we solicited business. This rate information consisted of freight rates from the Lehigh Valley from our mills at Buffington and Universal and some rates from other mills in that territory. Rates from other mills were added from time to time. Our traffic department checked these rates constantly and in the event of a change, new rates were put on the cards. These cards were used at Pittsburgh up until 1915. During this period from 1908 to 1915, each of our salesmen was furnished with those freight rates for his road book. This road book included all the information which would be of benefit to him. It included information about the various dealers, contractors, architects, public officials and other consumers from whom to solicit business and also
35892 included this freight rate information. These books were periodically brought up to date.

Upon my return to Chicago in 1915 my work was to correlate certain activities in the Chicago and branch offices, and to work up for Universal a new system of forms, including freight rate forms in collaboration with the traffic department.

It was shortly after this that we prepared our first freight rate books which consisted of a loose-leaf book showing the freight rates from our own and from competing mills. The books issued by the Chicago office showed the rates in cents per hundredweight and contained a conversion table. The Pittsburgh traffic department gave the information to salesmen in cents per barrel. We always followed the practice of dropping all fractions less than one-half cent and increasing all fractions one-half cent or more to the nearest whole cent.

My best recollection is that the first freight rate books of our company were published about 1916.

At the same time I designed a new road book for the

salesmen. This book carried a sheet for each town in the salesman's territory. Each sheet had a space for each of the dealers in the town, the name of the purchasing agent of the dealer, the name of the railroad he was located on,
the name of the men who did the buying, his storage
35893 capacity, and the brands of cement that he handled.
In addition, there was a list of all the contractors in that town and all State highway and county officials as well as architects, engineers, etcetera. There was also a space showing the sales and shipments that were made to each dealer or contractor. From this and the other information which a salesman had, he was always advised as to our price of cement at any given locality and also as to the status of the various customers with whom he came in contact.

Organization of the Wolverine Portland Cement Company:

The Wolverine Portland Cement Company is a Michigan corporation, with its principal place of business at Coldwater, Mich. The company has no other sales or branch offices.

The Wolverine Portland Cement Company was originally organized as the Michigan Portland Cement Company. Around 1900 the Michigan Portland Cement Company was reorganized as the Wolverine Portland Cement Company.

Wolverine now owns and operates two plants located at Coldwater and Quincy, Mich. Both plants are located on the New York Central Railroad. It does not own or operate any warehouses, silos, or other distributing points.
Both of these plants are up-to-date, economic plants and
are being kept up-to-date. The daily capacity of
35894 each plant is about 1,500 barrels of cement, which
amounts to about 1,000,000 barrels of effective operating capacity for the two plants.

Both the Coldwater and Quincy plants are wet process mills. Both plants secure calcium carbonate from a supply of marl contained in the lakes adjacent to the mills. The clay is secured from a bed which is near the Coldwater plant. The fuel is generally obtained from West Virginia, and the gypsum is obtained from various places depending upon the lowest price which can be secured.

To my knowledge, no cement manufacturer holds any stock in the Wolverine Portland Cement Company and Wolverine holds no stock in any cement manufacturing

company. None of the officers or directors of Wolverine are officers or directors in any other cement manufacturing company.

The company is not affiliated in any way with any other cement manufacturing company and does not have any working agreements with any other cement manufacturing company by virtue of which one company supplies the orders placed with the other company.

F. C. Mooney was sales manager prior to my association with Wolverine. He died in January, 1936, just before I came with the company.

Since I have been with Wolverine I have determined Wolverine's pricing policies

35895 Wolverine's sales territory:

The Wolverine Portland Cement Company normally solicits and ships cement into southern Michigan, northern Indiana, northwestern Ohio. Occasional shipments are made into northern Illinois, Wisconsin, and the Upper Peninsula of Michigan, but, ordinarily, Wolverine does not solicit that territory.

There are comparatively few large markets for cement in this territory. Wolverine's best markets are cities in Michigan south of Grand Rapids and Indiana north of Indianapolis.

Wolverine's principal sales are to dealer accounts.

Wolverine sometimes follows a contractor out of its normal sales territory, if the job is attractive and in order to maintain its connection with that contractor.

At all of the large consuming points in its sales territory, Wolverine finds ten or more competing companies actively engaged in soliciting and selling cement. At many of the points in Ohio there are around twenty competing companies.

In the State of Michigan, Wolverine comes into competition with the following cement companies:

Aetna
Alpha
Consolidated
35896 Ford
Huron
Medusa
Peerless
Petoskey
Universal Atlas, and
Wabash

In the State of Indiana, Wolverine comes in competition with the following cement companies:

Aetna
Alpha
Consolidated
Diamond
Huron
Kosmos
Lone Star
Louisville
Marquette
Medusa
Peerless
Pittsburgh Plate Glass
Southwestern
Superior
Universal-Atlas, and
Wabash.

35897 In the State of Ohio, Wolverine comes into competition with:

Aetna
Alpha
Bessemer
Consolidated
Diamond
Kosmos
Lehigh
Lone Star
Louisville
Medusa
Peerless
Pittsburgh Plate Glass
Standard
Southwestern
Universal-Atlas
Wabash
West Penn, and the
Two Green Bag companies, one from West Virginia, and one from Pennsylvania.

Since I have been with the Wolverine Portland Cement Company we have done very little business in the Detroit market, because the prices have made it an unattractive market and because of the service elements involved;
35898 however, shipments are made in the areas surrounding Detroit.

Generally speaking, the Wolverine Portland Cement Company tries to keep its contacts with all the trade it has shipped for a number of years, in an effort to hold its trade and to maintain its position with those dealers and customers where it has built up good will as a result of time and money expended by the company over a long period of years.

We do not sell or solicit business in Mississippi.

In determining the area in which we will normally solicit business, we consider both the transportation cost to destinations and also our sales cost and then weigh these figures against the volume which we can anticipate getting from the area in question. For this reason we are often ready to ship into territory outside of the area in which we solicit since we are located favorably freightwise, but it is a territory in which it would not be profitable for us to exert any sales effort.

We do not set a minimum mill net figure below which we will not go in handling our sales. Each order and contract is handled on its own merits. If the net is too low to suit us under all the circumstances, it is not accepted. In determining whether business is acceptable there are many factors to be taken into consideration, such as the customer requesting the shipment, the freight rate to the destination, the volume of business booked under other contracts, 35809 the amount of shipments made by us during that shipping season, and the service which we can give.

The element of the service which we are in a position to render tends to discourage distant shipments. Our marketing area in the State of Michigan is determined by trucking distances, and our sales area is limited to that territory where we feel that we can give good service in trucks, and 95 percent or more of our shipments are made by that method of transportation.

Method by which Wolverine obtains information as to competitors' prices and methods of marketing:

The Wolverine Portland Cement Company obtains its information concerning the published and unpublished prices of its competitors by means of information picked up in the field by its salesmen. Its salesmen operate under instructions to transmit to the home office immediately any changes in the competitive practices or prices which they may find or hear of in the field. Its salesmen send to the home office all quotations of price changes or announce-

ments of policy changes that they can pick up in the hands of customers. Wolverine also gets much information of competitive moves directly from such customers by way of telephone calls or letters. Another source of such information is tabulations of bids submitted to governmental agencies which are obtained by salesmen who attend the letings, or from reports of the bids published in news-
35900 papers and other periodicals.

It does not take a very long time for Wolverine to get news of changes in competitive prices or policies. In most markets such information is obtained almost as soon as the competitive announcements are in the hands of the consuming trade. In all cases, the lapse of time is very short, and never more than a day, before Wolverine is fully apprised of competitive moves through the information which its salesmen are able to obtain in the field. Commodity prices published in newspapers and trade journals are also a source of information which is considered occasionally along with information acquired through its salesmen. Wolverine does not receive information as to prices by telephone calls, telegrams or letters from its competitors.

Wolverine has found building material dealers and contractors to be well-informed as to the delivered prices quoted on cement. It finds that purchasers compare the prices quoted by the various cement companies and keep in touch with the various sources of supply. It also finds that it is the practice of contractors to shop around to make sure that they obtain the lowest price quoted in any given market.

In the company's experience it has not found either a dealer or contractor willing to pay more for Wolverine cement than for a competitor's brand.

From the company's experience in selling cement,
35901 it has found that it cannot sell cement for more than its competitors and it has also found that it cannot permit any competitor to sell cement in any market at a price less than that quoted by Wolverine, or else Wolverine will be eliminated from that market.

In the event of a decline of price, Wolverine has found that its regular dealer and contractor customers give it an opportunity to meet the lower prices quoted by competitors if Wolverine wishes to do so.

In the course of our daily operation, dealers normally

telephone in their orders for cement. In calling in such orders there is usually no discussion of price, except at the time of a price change. The dealer is invoiced at the last price we have quoted to him. If that price is higher than that quoted by any other company to that dealer, the dealer usually brings it to our attention and we must meet the lower price to secure the dealer's business.

I have found since I have been connected with the cement industry, dealers report to salesmen immediately information concerning price declines, at which time they usually request to have their recent orders protected and invoiced at the new low price. We have generally followed this procedure on shipments made five days before the decline.

I have also found that in the event of a price advance, the dealers immediately bring that to the attention
35902 of our salesmen in an effort to find out whether or not they have to protect themselves on future shipments of our brand of cement. At the time of bringing an increase in price made by one company to the attention of our salesmen, dealers usually request information as to whether or not we intend to follow along with the price increase. They also request information as to whether or not we will protect them on certain specific jobs which they have sold to contractors or others.

Since I have been with the Wolverine Portland Cement Company, we have issued quotations to the dealer trade to whom we sell or from whom we solicit business whenever there is a change in price, terms, or conditions of sale. In addition, there have been occasions when we have issued quotations when there is no change in price. This is done in order to put our name before some of the dealers and amounts to a form of advertising.

In the event of a reduction in price which we decide we will meet at a given destination, we normally authorize our salesmen to meet this reduction prior to a dealer's receipt of our quotation. Under such circumstances, we confirm the prices quoted by our salesmen by means of a letter.

Wolverine's method of analyzing delivered prices:

Upon receiving the first information about a new quota-
tion either above or below the previous market, we
35903 advise all of our other salesmen to check the de-
livered prices at the points in their territory. Our salesmen attempt to confirm either the old price or to ascertain what changes have been made at all of the important

points where Wolverine cement is consumed, and we always approach the dealers who consume large amounts of our cement. This information is then telephoned and forwarded to the home office where we take the various quotations we have received, and we compare the delivered prices which have been quoted.

During the time that I have been with the Wolverine Company the comparison of the delivered prices has, on several instances, shown that a flat price was quoted at most of the points in the Lower Peninsula of Michigan, and we assumed that this price existed for the entire Lower Peninsula, until we found information to the contrary. We never found any such information.

At other times the delivered prices appear to form a pattern from some mill, the delivered prices varying in accordance with the amount of the freight rate from that mill to the various destinations. We then carefully check to ascertain whether or not there is a uniform net at this company's mill or silo, and if there is we assume that the competitor intends to receive that net—sometimes called a base or price base or so-called base price—on all of his business.

35904 With that information as to the mill net or base, we attempted to anticipate the delivered prices which that company would quote at other points, and we assumed that we had met his competition unless we heard to the contrary from our dealers.

With this information as to the delivered prices, whether they are zone prices, or appear to be made up of some base plus freight, we issue quotations either meeting the change or restating our own prices.

Upon issuing quotations to points at which we have not specific information as to what prices are quoted, we have no assurance that our price will meet the prices quoted by the company initiating the price change. As soon as we have issued the quotations, unless we hear to the contrary from our dealers, we are sure that if our quotations were higher than our competitors, our dealers would inform us, and if our quotations were lower than our competitors they would be forced to meet our new low quotations. In addition, if our quotations were lower, our salesman would probably be advised of this fact on his calling upon the trade.

When we broadcast quotations, we send them to all our

dealers and prospective dealers, but we do not send them to any of our competitors.

We have never received quotations mailed direct to us from competitors.

35905 Basis upon which Wolverine quotes its prices:

It is the practice of the Wolverine Portland Cement Company to quote destination prices. This has been the practice as long as I have been connected with the company. It has also been the practice to meet the lowest delivered prices which we found quoted in any market in which we wish to sell.

Wolverine is usually a price follower. In some instances we have sent out quotations at prices which were not the same as the prices quoted in the market by our competitors, but in general we have met the destination prices as we have found them.

In arriving at its delivered prices for the various destinations where it sells cement Wolverine recognizes that the market price at many points usually reflects some base or basing point except when zone prices appeared to have been quoted in Michigan. Wolverine, however, quotes the lowest quoted price at each point where it sells cement regardless of whether or not the delivered price appears to reflect a base.

During part of the time that I have been connected with Wolverine, the lowest prices we found quoted in the State of Michigan could not be figured back to any base plus freight, but they appeared to be a flat zone price for the entire Lower Peninsula of Michigan. Pursuant to Wolverine's practice and in order to remain in the Michigan market we met those delivered prices wherever we found

35906 them and met the delivered prices at other points in the area where we market cement regardless of the manner in which they appeared to be made up.

Neither of the mills of the Wolverine Company are so-called base mills. The reason that the Wolverine Company has not inaugurated bases at its mills is that these plants are small plants and are not located close to any large consuming area and that, as a result, any base which Wolverine might establish would affect only a limited territory of small consumption. In addition, the delivered prices in the State of Michigan have been so low that Wolverine has not been able to secure for its cement the prices which

it would like to secure. The establishment of a base would have to reduce still further the prices in Michigan in order to be effective.

Another reason for not establishing a basing point at either of our mills is that any reduction in prices resulting from establishing such basing point would not result in any increase in volume of the business of the Wolverine Portland Cement Company, and could affect only a very limited consuming area where little cement is consumed.

Wolverine is free to make either or both of its mills base mills at any time, if they should decide that it was advisable.

To my knowledge Wolverine has never established a base at the mill of one of its competitors, and it has never
35907 reduced the price base at the mill of one of its competitors and no competitor has imposed a base on either of the mills.

While Wolverine is usually a price follower, it has on two instances since I have been associated with it been a price leader. We mailed quotations on September 3, 1938, effective at once quoting a price of $2.00 per barrel in cloth to our quotation list in Southern Michigan.

On September 16, 1938, and effective September 21, 1938, we issued quotations raising our prices to the level in effect prior to September 3, 1938.

F. o. b. Mill *vs.* F.o.b. destination prices:

It has been the practice of the Wolverine Portland Cement Company to quote and sell its cement for delivery f.o.b. destination. The reason that Wolverine now follows that practice is that our experience has been that the purchaser is interested in the price at the point where the cement is to be used and is not concerned with what we net at our mill. I have always found that the competition we had to meet was at the point of use.

Wolverine quotes delivered prices to enable it to compete with other manufacturers and to enable its dealer and contractor customers to compare its quoted prices with the prices or delivered costs quoted by its competitors.

I recall no requests by dealers or contractors for prices f.o.b. mill. My experience has been that dealers and
35908 contractors request prices f.o.b. their destination or place of use.

Although in a few instances Wolverine has received re-

quests from departments of the Federal Government for bids f.o.b. mill, the usual form of request is for bids on cement f.o.b. destination. Such inquiries have been received by the Wolverine from the following federal and state departments:

Department of Justice, Division of Penal and Correction Institutions;
United States Naval Training Stations;
Department of Interior;
Department of Commerce, Lighthouse Service;
National Park Service;
United States Engineers Office;
Michigan State Procurement Office;
Ohio State Highway Department;
State of Indiana Conservation Department.

History of prices in Michigan:

Since I have been connected with the Wolverine Portland Cement Company and up to December 1, 1938, I have found the following changes in delivered prices and terms of sale in our Michigan area:

(1) On June 3, 1936, our salesmen found in the field, competitive quotations dated and effective June 2, which, after deduction of freight rate and package charges, 35909 indicated a uniform mill net or so-called base at Saginaw or Bay City of $1.40. The previous uniform mill net was $1.50. On June 5, I issued instructions that we would meet this reduction and quotations were mailed by our office, dated and effective June 4, 1936.

(2) On December 11, 1936, our salesmen found in the field, competitive quotations dated December 10, effective December 15, which, after the deduction of freight and package charges indicated an advance in the Saginaw and Bay City base from $1.40 to $1.50. Upon finding that other companies had issued similar quotations on December 11, 1936, we mailed quotations dated December 11, effective December 15.

(3) On December 15, 1936, our salesmen reported a quotation in Lansing, Mich., dated December 15, effective December 15, quoting for delivery on cement at the destination price effective at Lansing prior to the increase indicated by quotations dated December 10 and 11, and effective December 15. We did not issue new quotations meeting Wabash's lower prices, but no sales were made at the

advanced quotations issued by us on December 11, effective December 15.

(4) On December 26, 1936, information was received from our dealers, indicating that Universal Atlas had issued quotations dated December 26, 1936, effective January 1, 1937, indicating and stating on the face of the quotation that the reduction in price was due to reduction in the freight rates, the emergency freight rate ex-
35910 piring on December 31, 1936. On January 2, 1937, we issued quotations meeting the new delivered prices we had found in the field effective as of January 2.

(5) On January 4, 1937, our salesmen reported finding quotations from the Huron Portland Cement Company at various destinations in Michigan, quoting prices effective January 4, in the amount of $2.10 per barrel in cloth at all points where we were able to check the information.

On January 5, 1937, we authorized our salesmen to meet this price and we mailed quotations to the dealer trade effective at once on the same date.

(6) On June 24, 1937, I learned from our salesmen and from our dealers, that quotations were received by dealers in Wayne, Oakland, and MacComb Counties, that the Huron Company had quoted a price of $2 per barrel in cloth, at all destinations in these counties. We met these quotations at those points where we sold cement.

(7) On August 30, 1937, we received information from our salesmen and our dealer customers, that quotations had been received in Grand Rapids from the Huron Company effective August 30, quoting $2 in cloth. On the same day we were advised by dealers in other towns and found quotations from the Huron Company at a great number of destinations, effective August 30, quoting a price of $2 per barrel, indicating that the Huron Company had reduced their prices at all other destinations in Southern
35911 Michigan. We met those prices and mailed quotations to all our dealers on August 30, effective August 30.

(8) On September 8, 1937, a dealer at Wayne, Mich., advised us that the price quoted to him was 10 cents higher than that quoted by Huron and others. On check made that day with other dealers in Wayne, Oakland, and MacComb Counties, we found that others had been received from the Huron Company on August 30, 1937, quoting a price of

$1.90 in cloth at destinations in those counties. We met those lower prices on sales to those dealers we ordinarily sold in that territory.

(9) October 13, 1937; our salesmen reported delivered prices, which, after the deduction of freight rates and package charges, indicated a reduction in the Cleveland base from $1.65 to $1.50. On October 18, I authorized the meeting of those prices effective at once.

(10) In November, 1937, our salesmen picked up in the field competitive quotations at destinations in Indiana, effective November 15 and November 18. We mailed quotations in Indiana effective November 18 advancing the price to new levels which apparently indicated an increase in freight rates of from 1 to 4 cents per barrel.

In Ohio we picked up quotations in the field effective November 15 and November 22, indicating an advance in price on account of changes in the freight rate. We issued quotations effective November 22 meeting those 35912 changes in price.

The prices in Michigan were not changed at any destination by this change in freight rate.

Quotations of price by Wolverine salesmen:

Wolverine salesmen are now and have been for many years supplied with lists of delivered prices. In their daily work they ordinarily have no occasion to use them. Each salesman generally knows Wolverine's destination prices in his territory, and he quotes that price to customers there. If he finds competitors' prices different from those he is quoting at some of these points, he consults the home office. All his quotations are subject to confirmation by the sales office. Cement Institute freight rate books are not supplied to Wolverine salesmen.

Salesmen of the Wolverine Company have no occasion to, and do not, calculate the delivered prices to any points by use of freight rate information and information concerning so-called price bases.

In the event of a change in price, Wolverine receives information and collects quotations concerning the new announced price or prices at all of the important destinations at which it sells cement. This practice is followed in all instances and as a result there is no necessity for the computation or calculation of prices at any time by salesmen.

Bids by Wolverine to the Government:

35913 It is the general practice of Wolverine on all Government work, both federal and State, not to bid lower than its regular commercial price at any particular destination. The reason for this policy, aside from the fact that Wolverine has never felt that the Government is entitled to any lower price than its regular trade, is the fact that a lower price to the Government would react unfavorably upon Wolverine's customers. Wolverine respects the views of its dealer and contractor customers because it has to rely on their regular business. Government business is spotty and never results in what can be called "having a customer"—that is, a regular year-in and year-out customer.

On making a bid to the State or federal agency we look at our destination price list, and insert in the bid blank the price which is shown in our list.

We have never asked the Federal Government for the privilege of withdrawing a bid.

Wolverine has not made any bids to the United States Government for delivery at destinations where land-grant rates are applicable, and the company has never used the so-called control clause.

35915 Situations such as these are more or less prevalent in the territory where Wolverine markets cement. In jobs involving substantial quantities of cement, I have found where special prices, terms or services have been available to the user of such large quantities of cement. So far as I was able to find out these prices were at figures less than the lowest published market prices or at more favorable terms. Wolverine's practice has been to sell at its quoted price in the territory and on occasions the company has met special prices when it has been necessary to maintain its position in the market.

There may be secret price concessions which some of my competitors have made which I do not know about, but I have found that under normal circumstances a

35916 friendly dealer or contractor customer of the Wolverine Company will tell our salesman or tell me in the event that he has secured a special concession from one of our competitors, and will give us the opportunity to meet such concessions.

Importance to Wolverine of the dealer in the marketing of cement:

The dealer is Wolverine's most important customer. Around 90 percent of the customers sold by Wolverine are dealers. The importance of the dealer has had a tremendous influence on Wolverine's marketing methods and policies. Wolverine is confronted with a constant necessity for preserving dealer outlets, for fostering the dealer's goodwill, and giving him a price and terms that will enable him to compete with other dealers selling in the same consuming area.

Wolverine's Concept of a Dealer:

Wolverine requires its dealers to be persons to whom the purchasing public looks in its buying of cement and other building materials. In Wolverine's determining whether or not a person will be sold as a dealer we examine what facilities he has, what stock of materials he carries on hand and whether or not he has a good credit standing. Wolverine has made it a practice to investigate dealers carefully to see if they would be in a position to assist in the marketing of Wolverine cement.

35917 In June, 1935, Wolverine as a part of its announced policy included a definition of a cement dealer substantially as it was contained in the N.R.A. Code for the Cement Industry. The application of this definition varies, depending upon whether or not Wolverine has adequate dealer representation in a given market and upon the size and needs of each market.

Wolverine sells some cement direct and some through dealers:

Wolverine sells through dealers only when sales through established dealer channels seem fair and logical, and where dealers render a service to the ultimate consumer.

Wolverine's records show that Article XI of the N. R. A. Code made no substantial change in the marketing practices of the Wolverine Portland Cement Company. After Article XI was suspended, Wolverine continued to sell on substantially the same basis as before.

In June, 1935, a statement of policy on this subject was issued. As far as I know this announcement was not the result of any meeting with dealers or dealer organizations, or the result of any meeting with competitors on this subject, or the result of any agreement or understanding with competitors on this subject. I have continued this policy, but I have not agreed with any competitor or dealer to continue this policy. Since this announcement there has been

no understanding or agreement with any competitor whatsoever with respect to the marketing practices of the company or its application.

35918 Wolverine's terms of sale and discount:

From my past experience in the cement industry I have found that the terms of sale and discount quoted by the various companies tended to be uniform. At one time the cash discount was on a percentage basis. Subsequently this became 1 cent a barrel, 2 cents a barrel, 5 cents a barrel and finally 10 cents a barrel. Each one of these changes resulted in more favorable terms to the customer and in each case the competitors of the company responsible for the change were forced to adopt it in order to maintain their position in the trade.

Wolverine has always made its terms at least as favorable as any granted by its competitors because we could not compete as long as we were offering terms which were less advantageous than those offered by other manufacturers. Whenever competitors started giving terms which were more favorable than Wolverine's it had to adopt the change. Our reason for not granting more liberal terms is that we believe that competitors would meet such terms and we wouldn't gain any advantage by granting them.

Wolverine's practice concerning trucking:

The Wolverine Portland Cement Company trucks cement at the present time. On my coming with the company it was trucking pursuant to an announcement dated March 11, 1933.

Our trucking practice has been substantially to meet the trucking as we find it being done by our competitors
35919 in the territory where we market cement.

We allow dealers to come to the mill and take cement in their own trucks. The few small dealers that come are charged the same price as for delivery f.o.b. their destination. This charge is made because of the increased cost of handling such small deliveries, because loading them is a convenience to the customer, and because such sales are made in smaller truckloads than are provided for in our announced trucking policy.

On shipments made by truckers hired by us, we pay the trucking charges and bill the customer at the lowest quoted delivered price which we find in the market.

It is more expensive for us to load trucks than to load rail cars. We have found that truck deliveries have elim-

inated the inventories which dealers formerly carried, and such inventories had formerly constituted a source of steady demand, and that as a result the demand is more fluctuating and uncertain. Trucking has reduced the amount bought on each order because customers now order in small lots in order to meet their own delivery requirements, and not for stock.

Many large dealers of the Wolverine Company have told us that they were dissatisfied with trucking because they have established themselves in business and set up warehouses, staffs and equipment.

Wolverine has never established a 15-cent sur-
35920 charge for delivery to trucks, as compared with rail delivery.

With the Wolverine Company at the present time we do most of our trucking by a limited common carrier and the remainder of our trucking by two trucks owned and operated by the company. By this means we are able to plan a definite schedule of packing and shipments and we do not have any of the inconvenience resulting from the presence of a great number of dealers' trucks.

Water shipments by Wolverine:

Wolverine makes no shipments by water because its mill is not located on navigable water, and in order to ship by water it would have to load the cement on cars or trucks and transport it at least 90 miles to the nearest port. The cost of such operation is prohibitive.

Wolverine does compete with manufacturers who do employ water transportation.

Wolverine does not encounter competition from imported cement:

The Wolverine Portland Cement Company does not sell in any territory where it comes in competition with imported cement.

Wolverine's freight rate information:

Salesmen of the Wolverine Portland Cement Company are not given copies of The Cement Institute freight rate book. They are, however, given information concerning the freight rate from our mill to various destina-
35921 tions located in their sales territories. This information is given to our salesmen so that as a matter of information they will be able to know and tell customers what the freight rate is, if they are requested. This freight rate information is not used in any way in making prices

and the salesmen are not given any information concerning freight rates from competing mills.

We do use The Cement Institute freight rate books in the home office as a source of freight rate information. This information is used in the place of compiling freight information from the official railroad tariffs and is employed because it is a cheap and convenient method of securing the information. If we did not have this information we would compile it at additional cost to us.

Most of our shipments are either by truck or to points where we have made previous shipments. To such points we use the same rate and route as we used on the last shipment. This information my assistant knows from experience or obtains from the last shipping order unless there has been a change in rates. Changes in rates from our mill have been infrequent and consist of emergency rate changes or other blanket changes. On shipments to other points we use the New York Central Tariff and Routing Guide to determine the rate and the route from our mill. In order to give our customers as good service as possible, we usually route rail shipments; if we have shipped them before, we generally use the same route.

35922 Wolverine and The Cement Institute:

The records of the Wolverine Portland Cement Company indicate that in January, 1930, the Institute notified us that we had been elected to membership. On January 31, 1930, Wolverine notified the Institute that it could not accept membership at that time and on February 8, 1930, we informed the Institute not to forward any more material to our company. Later during that year we subscribed to the freight rate service of the Institute without becoming members.

The Wolverine Portland Cement Company joined the Institute in 1933 at the time of the N.R.A. Code and we have remained a member of the Institute during all the time when I have been associated with the company.

None of the officers, directors or employees of the Wolverine Company have ever been trustees or officers of The Cement Institute. The Wolverine Company receives copies of statistical reports sent out by The Cement Institute. This information consists of a monthly statement of production of clinker and ground cement, shipments and stocks on hand for the past month. This information is distributed to us by The Cement Institute without any comment.

None of this statistical information has any reference whatsoever to price or any elements of price.

I look over this statistical information to see whether anything contained in it might be of interest to us.

35923 Generally speaking, we use it merely as a means of keeping posted on matters of general information. We also receive Government reports made by the United States Bureau of Mines which cover substantially the same ground, but which are received at a considerable later time.

Nelson's work with the N.R.A. Code Authority:

I was employed by the N.R.A. Code Authority for the Cement Industry from February, 1934, until the Schechter decision of May 27, 1935. During that period, under the direction of G. H. Reiter, secretary and later Chairman of the Code Authority, I had charge of the filings which were made by the individual cement producers pursuant to the provisions of Article IX of the N.R.A. Code.

Under Article IX of the N.R.A. Code for the Cement Industry, every producer of Portland cement was required to file prices with the Code Authority. The Code became effective December 7, 1933, and prices were to be filed within 5 days of the effective date, or December 12, 1933. Many producers filed prices at the last moment and as a result it was a tremendous job to collate the figures filed by the various individual producers.

The Cement Institute turned over to the N.R.A. Code Authority the facilities of its office and the staff, but this task proved too big for the existing staff and I was hired to supervise the work of price filing.

35924 At the time of my coming with the Code Authority, the work was weeks behind and was still piling up as the result of new filings. We had received filings from each manufacturer. These filings included prices for destinations throughout the country, including all points whether towns or not where cement was being consumed. Prices were filed for some 60,000 points and covered all types of delivery, such as rail, truck, boat, and barge. New filings were continually being made. For a period of several months whenever a request came in for information concerning any filings, it required a tremendous amount of work to supply the information, as reference had to be made to the various original filings in most cases.

The Code Authority had already installed a card index

system on which all of the prices filed for a given destination were to be shown on a single card, and these cards were filed alphabetically by destinations in each State. It took several months to complete this card file.

It was my understanding that the N.R.A. Code had been interpreted by the Code Authority to the effect that each producer was entitled to be informed as to what prices were on file when the Code became operative and effective, in order to enable him to meet the prices filed by any competitor as was provided in Article IX of the N.R.A. Code, or to make such new filings as he might determine on the basis of the prices and terms filed by his competitors.

35925 Because of the volume of filings we could not easily mail to all companies a complete list of all prices on file. The filings covered approximately 60,000 destinations and so much clerical work was involved which had to be done rapidly, that we were afraid numerous errors had crept in. In a few cases where inquiries came in or some question was raised as to what prices were filed at a specific destination and where the figure filed by an individual producer for the point was at variance with that filed by its competitors, during the early stages of open price filing under the N.R.A. Code and until all prices had been posted on our cards, we wrote to the individual producer whose filing, according to our records, differed from the rest. We did this regardless of whether the price filed was above or below the prices filed by other companies or above or below what appeared from the filings to be the prevailing price.

This was not done in order to dictate in any manner what prices an individual producer should file, but as the result of the tremendous number of filings and the possibility that errors had been made in the posting of these filings. Our purpose was to inform a company what the Code Authority records showed so that this figure could be compared with the price the producer was actually using at the point in question, and to give a producer a chance to correct us if our records were in error.

35926 In some cases producers replied to our inquiries that they had not intended to file the figure as shown on our records, and in other cases that the figure was intended to be a new filing.

During my long experience in selling cement I have found that published prices tended to be identical at a

given point and this knowledge caused me to doubt the accuracy of our records where one or more filings were at a higher or lower figure than that filed by other producers.

Subsequently we sent to all companies who might be affected by any filing, notices of all changes in filings or any new filings. The Code Authority did not concern itself in any way with the prices which were filed by any cement company. The only requirements were that filings had to be in writing and be definite and unambiguous. If they were not, the filing company was so advised and allowed to clarify its filing. We received and filed f.o.b. mill prices and delivered prices regardless of how either were arrived at.

When the N.I.R.A. was declared unconstitutional, some of the Code Authority staff was kept on as employees of The Cement Institute since at that time we felt that some sort of a successor to the N.R.A. Codes would be set up by the Government. I, therefore, continued my work under the direction of the Trade Practice Committee in connection with the voluntary filing of prices. My work with
the Trade Practice Committee was the same as with
35927 the N.R.A. Code Authority. For some time the
voluntary filed prices continued to be received. The practice of filing prices died out steadily after the Schechter decision and until about within three months there were very few filings. In December, 1935, all filings were discontinued. My work with the Trade Practice Committee of The Cement Institute then terminated.

35935 April 5, 1940,
Washington, D. C.

35947 Mr. Werle: Before Mr. Nelson takes the stand, Your Honor, could I at this time again refer to the subject matter which we left open, to-wit, our position with respect to striking certain testimony of Major
35948 Lewis in connection with the T.V.A. matter.

You will recall that at the time that Your Honor granted Mr. Wooden's motion—

Trial Examiner Norwood: Yes.

Mr. Werle: —you said we would have an opportunity to check the record and bring it up again.

Trial Examiner Norwood: Yes.

Mr. Werle: We have checked the record over on that, Your Honor.

It occurs to me that since it happened quite a long time ago, it might be helpful to review very briefly the situation as to that, before I explain our position.

Trial Examiner Norwood: Go ahead.

Mr. Werle: Your Honor will recall that we offered testimony and exhibits through Mr. Charles F. Lewis, of the Volunteer Portland Cement Company, bearing on costs, relation of costs to cement prices, the reasonableness of cement prices, and the fairness of the prices at which the Tennessee Valley Authority purchased cement from the Volunteer Portland Cement Company, and certain other Respondents, and Your Honor will recall, I think, that we had a rather lengthly discussion, partly on and partly off the record, about that matter, the question being whether or not that kind of proof was relevant and material to this inquiry, and the outcome of it was that

35949 Your Honor granted a motion made by Government Counsel to strike certain specified portions of the testimony of Mr. Lewis, and a number of the exhibits introduced in evidence while he was on the witness stand.

Now, at this time, we move, Your Honor, to reinstate in the record, with the same force and effect as it had originally, the testimony of Major Lewis which was stricken, and also the exhibits which were introduced through Major Lewis, and all of which was stricken by Your Honor on the motion of Government Counsel.

Now, I think it might be helpful, so that we have this all at one point, if the stenographer could copy in the exhibits and testimony—that is, the exhibit numbers and pages of testimony—

Trial Examiner Norwood: You mean to refer—

Mr. Werle: From the prior record.

Trial Examiner Norwood: You mean refer to the previous record there, for a list of them?

Mr. Werle: No.

Trial Examiner Norwood: It is not necessary to carry them forward and repeat them here.

Mr. Werle: I thought it might be helpful to have them go in twice.

Trial Examiner Norwood: I do not think so. I think we can get it—to save expense.

35950 Mr. Werle: The exhibits and testimony to which our mofion is directed are set forth at page 32931 of the record, beginning on line 11, and continuing over to page 32932, through line 3; also beginning on page 32933, line 20, and continuing through page 32934, line 6.

The grounds for our motion are several, Your Honor, but I believe the basis for Your Honor's ruling, and the crux of this entire controversy that we had, is expressed in the colloquy that appears on the record at pages 32938 and 32939. That was a colloquy between Your Honor and Mr. Wooden and Mr. Leisure, and at that time Your Honor stated "The fairness of price is either in this case or out of this case and if fairness of price is in this case anywhere then the figures as to any particular company showing that certain figures are fair will be relevant and material and may be put in if they will complete the story and put it in correctly. It is either in or it is out. I want to know which."

That was Your Honor's statement at that time.

Mr. Wooden took the position which he has taken on several occasions, that the fairness of price, and the relation of costs to prices, were irrelevant because they do not tend, he said, one way or another to establish the existence or non-existence of an alleged combination; but then he continued and said: "But on the other hand

35951 if the combination is established," then he says, "then it necessarily follows that prices are unfair and unreasonable and monopolistic prices."

Now, the positon taken by Mr. Leisure at that time—and it is our position now, if Your Honor please—was,—and this is quoting from Mr. Leisure's statement: "Of course our position is, Your Honor, and has been since this case started, that fairness of price and costs are in this case, and that it has a direct bearing as to whether or not there was in existence a conspiracy or a combination."

Now, I believe, if Your Honor please, that in that colloquy rest our grounds for the motion, broadly stated, and the grounds upon which Your Honor removed this other evidence, but I would like to particularize the grounds of our motion a little bit further.

In the first place, Mr. Wooden's specifications of documents and testimony, which you consented to be deleted, has not fulfilled either his statement on the record or the requirement which Your Honor laid down.

As I recall it, he announced that he would remove from the Government's case the following matters—and this is taken from the record, page 32958 and 59:

"Any documents or testimony relating to costs either of the industry, or any portions of the industry,
35952 estimated costs of the proposed T.V.A. plant, estimated costs of producing cement by T.V.A., profits and losses of cement manufacturers, or fairness of cement prices."

Now, it was on the assurance that Mr. Wooden would delete the evidence that Your Honor granted his motion to strike certain exhibits and testimony of Major Lewis, and our position, first, is that the Government has not withdrawn evidence of that character.

Trial Examiner Norwood: Well, now, you are going to make a motion, then, that in case your first motion is denied you move to strike such additional testimony which has not heretofore been struck on the subjects which you have enumerated there of fairness of price and costs, and so forth.

Mr. Werle: I think, Your Honor, the rest of the grounds that I state will indicate that that must be, I suppose, the alternative.

Trial Examiner Norwood: Yes.

Mr. Werle: And at the same time it will indicate the scope of that alternative.

Trial Examiner Norwood: I see.

Mr. Werle: But that is—

Trial Examiner Norwood: But I do not think that our tentative discussion of that at that time should be determinative of the situation entirely. We have had
35953 time to think over these matters since then.

Mr. Werle: Of course, that is why I am bringing it up again, Your Honor please. It is important to us, and important to the Respondents, and we think the matter ought to be determined so that we know exactly where we stand.

Trial Examiner Norwood: Yes.

Mr. Werle: At the present time we do not.

Trial Examiner Norwood: Now, I—

Have you completed your statement, Mr. Werle?

Mr. Werle: May I just complete the statement of the ground, Your Honor please?

Trial Examiner Norwood: Go ahead.

Mr. Werle: We contend that the testimony of Major Lewis, and the exhibits which were stricken, are relevant and material because they directly relate to the charges in the Government's complaint, particularly paragraph 8 of the complaint, sections (b), (c), (d), (f), and (j), and paragraph 9 of the complaint, sections (1), (4), and 5).

There are other paragraphs, and I think the complaint is permeated with the inference and the charge that our prices are unfair and artificial; but in those paragraphs, particularly, it is stated in substance that we do maintain against thousands of private and public consumers throughout the United States a high and artificial price level.

35954 Then as a further ground for reinstating this testimony, we rely upon the evidence of the Government relating to T.V.A., which still remains in the case.

Now, as to that, Your Honor, I can specify that or I can summarize it to indicate that Mr. Wooden has not withdrawn one single factor which was not in there before, and what he has done is take out some figures, so that he now has all the inferences and the benefits of those figures and the evidence which was in them, but I think for the moment it is sufficient to state that that is another ground, and if Your Honor wants me to specify more fully, I am prepared to do it.

As a further ground for our motion, certain of the testimony of Major Lewis and certain of the exhibits offered through him, which were not stricken by Mr. Wooden, which were sandwiched in between parts that he did strike, leave an inference of unreasonableness and unfairness of the Volunteer prices on the T.V.A. business and the evidence which contradicts and explains that Mr. Wooden has removed, so we have a half of the story left, and we say that the half that is left is not true. It represents an incomplete and inaccurate story.

As a further ground for our motion, we rely upon the evidence introduced by the Government through a number of witnesses, particularly through economic wit-

35955 nesses, to the effect that cement prices are inordinately high and monopolistic, and must be because of a certain method which is assumed in a hypothetical question. For instance, Dr. Fetter stated that on the face of this, the fact that companies get variable mill nets and that there is a spread between those mill nets, indi-

cates to him that base prices are decidedly high, that the average level of such prices is unreasonable, that they are monopolistic prices, and so on.

Now, that evidence as to the spread of mill nets of almost every Respondent remains in the record showing what the extent of it is.

Furthermore, with respect to the testimony that the Government has attempted to adduce in connection with cross-hauling, again that evidence was used as the basis for assumptions and hypothetical questions to bring from the economists further testimony about the enhanced base prices that prevail under this hypothesis.

As a further ground for our motion, we urge that the testimony and exhibits of Major Lewis, which have been stricken, show definitely the independent and individual action that the Volunteer Portland Cement Company took in connection with determining the prices that it would quote on the T.V.A. business, and determining whether or not it would quote one price or another. Since this 35956 is a conspiracy case, and the combination is charged, that evidence on that point alone, it is our position it is highly relevant and material because we did show the various steps through which Major Lewis, and his company went, in determining what prices the Volunteer Company would quote.

Trial Examiner Norwood: Well, it is not denied that they came to some understanding with the Government with respect to the manner in which they bid on this T.V.A. job; is that in issue at all?

Mr. Werle: That is as to the second letting, I think. If you confine it to the method by which the price would be determined, I think they did accede to the Government's request, whichever it was at that time, but Your Honor must recall that there are two T.V.A. lettings, two principal ones in this case, and as to that Mr. Wooden's evidence leaves in everything that helps him and deletes everything that helps us, and that is one of the grounds, as I have already stated, but I think it might be explained that this entire matter is of paramount importance to the Respondents in this case, and we do want a determination of it at the earliest possible moment. It is prejudicial and it is unfair to reserve to Counsel for the Commission any opportunity to argue from direct or circumstantial evidence or from inferences that costs, prices, and earnings,

are in any way unreasonable or inconsistent with
35957 full competition if on the other hand Respondents
are not going to be permitted to offer direct evidence on those subjects, and, particularly, the Volunteer Portland Cement Company, which has, in our opinion, before the evidence was restricted, demonstrated conclusively that Volunteer's prices on that letting were not the result of collusion or combination with anybody. They were independent, they were fair, they were reasonable, and it was shown that the last prices they quoted were really unfair to the Volunteer Company and not to the Government of the United States.

I think, Your Honor, that covers the ground, and I have checked the record pretty thoroughly on these matters, and I think I could refer Your Honor to the very matters we have in mind in connection with this.

Trial Examiner Norwood: With respect to some of that evidence, as I recall it offhand, it was unsatisfactory inasmuch as it made some general statements of the cement costs and did not give the complete picture of it, and we never know just what he considered costs, and all those factors that entered into it, some of that was very unsatisfactory, and I think that maybe that also applies to some put in by the Commission on these surveys. So I was glad that Counsel agreed to eliminate all of it.

Mr. Werle: Well, of course, if Counsel would eliminate
from this record everything from which he can ar-
35958 gue or draw the inference that costs in this industry
are lower than—that prices in this industry are higher than they ought to be in relation to costs, that our cement prices are unfair, unreasonable, that they are arbitrary, that they are monopolistic, and that the method was used to make our base prices, as they are referred to, advanced too high, if that is all taken from the record, and Mr. Wooden says that he is not ever going to argue that in any argument before any tribunal, and if he will stipulate that such an agreement as that be called to the attention of Your Honor and the Commissioners and any courts to which we go so that nobody can draw any inferences against us on it, I think we might come to some arrangement about it, but that is not what the complaint says, and it is not what Mr. Wooden does. He says he is not going to use it for purpose A, which is no concession, because he won't say he is not going to use it for any purpose.

Mr. Wooden: Your Honor, what this amounts to, on the part of Mr. Werle, is a suggestion that while we may adhere to our contention, our theory that Respondents have been engaged in an unlawful combination, he wants us to stipulate that the combination has not done any damage or any harm to the public because its prices are reasonable.

I stand with the Supreme Court on that in the
35959 Potteries case, and to say that is not a field that we can get into, and I am willing to stay out of it, but I do come back to my original position, and it has been consistent throughout, that given the existence of an unlawful combination, the unreasonable character of its prices must either be presumed or at any rate not be taken as proving or disproving the existence of the combination. That is my position throughout, and it is still my position. I cannot understand this great reversal which insists that it was out of the case and now has insisted that it is in again.

The truth of the matter is on this T.V.A. proposition, that they do not like to have the evidence in there that they made one price in March, 1934, and other one in September, 1934, because of the inference that might be drawn between the—as to the difference between those two levels of price, while during the period they were engaged in this cooperative activity. Now, that is the sum and substance of it.

Without checking these various references that Mr. Werle makes,—and that will take some time,—I cannot do any more than say at this time, to repeat my intention of striking from the record everything that relates to the common relation between price and cost, as to what the
cost of a company is or whether the relation between
35960 prices and costs is reasonable or unreasonable. I am not standing on such evidence. I am standing on the proposition, however, that given, as alleged, the existence of an unlawful combination that the prices necessarily in contemplation of law are unreasonable.

Trial Examiner Norwood: Well, then, couldn't he introduce evidence to show that they were—

Mr. Wooden: If he admits the combination, possibly.

Trial Examiner Norwood: —there were no unreasonable prices on the grounds that that tends to contradict the idea that the prices were arbitrarily arrived at.

Mr. Wooden: That is a matter of plain logic, you cannot determine the existence of a combination that way. A price may be unreasonable and perfectly legal, and it may be perfectly—a price may be too low and perfectly illegal. You cannot prove it either way. There are industries in which prices and profits have been high, and I would not say from that—I would not offer that as evidence that there is a combination in the industry. All sorts of conditions may create that, and, by the same token, the lack of high prices and the lack of unreasonable relations between cost and prices won't determine it.

Trial Examiner Norwood: But where you allege that a certain condition would produce unreasonable
35961 prices, then may they not show that the prices were reasonable in order to refute your proposition?

Mr. Werle: His premise, Your Honor—

Mr. Wooden: Possibly, if they are willing to admit that the alleged cause exists.

Trial Examiner Norwood: No, but this is introduced to disprove the alleged cause.

Mr. Wooden: It does not do it, as a matter of simple logic. It is irrelevant. The prices may be high or they may be low and won't show the existence of a combination, or the non-existence of it.

Trial Examiner Norwood: If it is alleged as an essential element, he can disprove it. If you allege it as an accident, that is different.

Mr. Wooden: It is not alleged as an essential element. It is, you might say, a pleader's conclusion, that this combination which is set forth in certain paragraphs of the complaint tends to have certain effects, and as a theoretical conclusion it is unassailable.

Trial Examiner Norwood: I think Counsel is right about it being a pleader's conclusion.

Mr. Brick: Well, without stating any further grounds, if Your Honor please, with respect to Mr. Wooden's reference to alleged theory, I think that we can crystallize the effect of his argument merely by saying that he de-
35962 sires to stay out of the field of direct evidence and to rely on unfounded inferences and conclusions which cannot be supported by direct evidence, and he says that he is willing to strike direct evidence, that he desires to strike the direct evidence because we destroyed, through Major Lewis' testimony, the conclusions which he sought,

Mr. Wooden sought, to draw from the direct evidence which he put in in the course of his case.

Now, it is perfectly understandable, and I say also illogical, that if he cannot prove his conclusions by direct evidence he wants us to be in the position where we cannot put in direct evidence, then as he says, if he can convince the Commission that there possibly is a combination in existence, why, then, he wants to jump a little further and say that from that combination you may infer that prices are unreasonable, earnings are excessive, that costs are not consistent with competition, and on that basis you have definite conclusions which we have not been permitted to rebut by direct evidence, and his conclusions in those cases will be utterly false.

Trial Examiner Norwood: Well, I think this: I say the reason for approving of that, I think it was in the form of an agreement to strike—

Mr. Werle: There wasn't any agreement, Your Honor.

Mr. Wooden: Let me say in answer to Mr. Brick's last statement that it is odd, in view of his remarks, that we could not get the balance sheets of the company showing what those earnings were, and we could not get the cost data from its costs records, but they insist on trying to put in a lot— 35963

Mr. Werle: That is not a correct statement, Your Honor.

Mr. Brick: That is another false statement.

Mr. Werle: That is another false statement, and I think we ought to have an opportunity to answer it. Let me put you straight on it.

Trial Examiner Norwood: All right.

Mr. Werle: In the first place, we had here, and marked for identification, the cost records of the Volunteer Company from which Major Lewis' testimony was derived, and from which his exhibits were derived. We offered to Your Honor the profit and loss statements of the Volunteer Company and said if Your Honor will pass on the relevancy and materiality we have no objection to them, and we will have them marked, and if Mr. Wooden does not want to offer them we will, but Mr. Wooden would not agree to that, and Your Honor would not make such ruling.

Trial Examiner Norwood: As I recall it, the cost data was very unsatisfactory, and I stated, I think, at the

time, or some other time, that there was a complete
35964 cost survey put in here of conditions which apply to more than one mill, and—

Mr. Werle: That was put in by the Government.

Trial Examiner Norwood: And it appeared clear as to just what was included in the cost items, and would certainly consider putting that in a proper reliable survey that could be checked, and I think one of the grounds for approving of the agreement, or granting a motion to strike, was that this cost data on both sides was not very satisfactory.

Mr. Werle: Well, as to that, if Your Honor please—

Trial Examiner Norwood: Now, when the question comes up later, if you want to put in the complete and reliable and satisfactory cost survey, I think the Federal Trade Commission would like to have it.

Mr. Werle: Well, now, Your Honor, I must take exception to that statement, because Your Honor said, if you remember it, the cost data—

Trial Examiner Norwood: Yes.

Mr. Werle: —was unreliable or unsatisfactory.

Now, I think Your Honor may have misspoken himself; but you did not see it—

Trial Examiner Norwood: I said that.

Mr. Werle: —because we had it marked.

35965 Trial Examiner Norwood: Yes.

Mr. Werle: And Counsel for the Commission would not take it, and I have them here, Respondents' Exhibits 2361, 2362, and 2363, for identification.

Trial Examiner Norwood: Well, there were some questions asked about it, and it appeared to me, at the time, whether by inspection and study, or whether by matters that were brought out in examination, that it appeared to be unsatisfactory, and some of the other cost data that was withdrawn, I saw that and it was unsatisfactory.

Mr. Werle: Well, Your Honor, the record does not show that. The record shows that the ruling was made striking this evidence on the grounds that Mr. Wooden would withdraw these matters.

Trial Examiner Norwood: Yes.

Mr. Werle: So that they were irrelevant and immaterial in this proceeding.

Trial Examiner Norwood: Yes.

Mr. Werle: And we have been laboring under that as-

sumption that that ruling meant what it said, to-wit, as long as Mr. Wooden withdrew his, ours were out.

Trial Examiner Norwood: Yes.

Mr. Werle: Now, we come back and say that he has not done that, so the reason for your ruling is gone, 35966 and my evidence must be reinstated.

Trial Examiner Norwood: Why don't you specify what other evidence should be struck pursuant to that understanding?

Mr. Werle: I would have to specify, Your Honor, about 2,000 Government exhibits, and about half of their record and testimony, and we did practically that in our motions to strike, and they were wholly and completely ignored, except in one or two instances.

Now, I do not want to be put in a position of going through that whole rigamarole again, and then have somebody say, "Why, it is ridiculous you should make such a motion as this."

Trial Examiner Norwood: Why, I think that his statement was very comprehensive about that, and I think it applied, and I think that in view of his statement if there is other testimony in the record that is objectionable from the point you have raised there, it would be ignored—

Mr. Werle: Oh, I have—

Trial Examiner Norwood: —in any finding.

Mr. Werle: Oh, it is the very—intestines, if I may use the word—of Mr. Wooden's case, and it won't be ignored, I am sure, either by Mr. Wooden or anybody else that is going to study this.

35967 Trial Examiner Norwood: I am going to ask Counsel for the Commission to check that testimony and let me know Tuesday morning what their attitude is with respect to striking this, with respect to striking other testimony in case your first motion is denied.

I would like for them to make a study of that and give me their reply then.

Mr. Brick: Your Honor please, that would hardly correct the situation in so far as the fundamental matter is concerned, because unless we have an understanding I think that that is the only solution, there must be an understanding among the Examiner and Counsel for the adverse parties—

Trial Examiner Norwood: Yes.

Mr. Brick: —that Mr. Wooden will not draw any of the

inferences with regard to these subjects which are unfavorable to the Respondents. If you are going to deprive the Respondents of an opportunity to come in here and offer evidence which will rebut or destroy the conclusions which he seeks to draw by inference, after he has failed to support those conclusions by direct evidence—

Trial Examiner Norwood: Yes. Well, now, this discussion has been very interesting, and I shall study it again.

35968 Mr. Brick: Yes.

Trial Examiner Norwood: Over the week end, and then— But at the present time I see no reason for granting that motion, and I have discussed this from the standpoint of probably receiving further testimony as to costs—

Mr. Brick: Yes.

Trial Examiner Norwood: —and so forth, in question.

Mr. Brick: I appreciate that.

Trial Examiner Norwood: Yes. But as to that T.V.A. testimony on both sides—

Mr. Brick: Yes?

Trial Examiner Norwood: —I see no reason at the present time for granting any motion to reinstate any of it whatsoever; but I shall ask Counsel for the Commission to state if there is any more of the testimony that they introduced that they wish to strike, and I shall ask Respondents' Counsel to specify any other testimony which they think should be stricken.

Mr. Werle: Would that include the complaint, Your Honor—

Mr. Brick: Well, for the reasons which we have stated—

Trial Examiner Norwood: How?

Mr. Brick: For the reasons which we have stated—

35969 Trial Examiner Norwood: Yes?

Mr. Brick: —that will be unsatisfactory to us and would not correct the error.

Trial Examiner Norwood: All right. Well, you can do as you please about that.

Mr. Werle: One further matter—

Mr. Brick: We have a right to bring in evidence to rebut conclusions which Counsel seeks to establish, or we have no rights with regard to evidence at all.

Trial Examiner Norwood: Yes. Well—

Mr. Brick: Now, we have got to have clearly stated on the record whether these subjects are material to the case. If they are, our position is that we have a right to introduce evidence on those subjects; and if they are not material to the case there is no right which should attach to the Commission's staff in permitting them to draw inferences in connection with any of those subjects.

That is our definite position. It is elementary fairness.

Trial Examiner Norwood: I shall ask the Commission's Counsel to make a statement on that Tuesday morning.

Mr. Werle: Is Your Honor withholding the ruling, as I understand it?

Mr. Wooden: Your Honor—

35970 Mr. Werle: Is Your Honor withholding the ruling?

Trial Examiner Norwood: Just as soon as I can. I would like to close this discussion.

Did you want to say something, Mr. Wooden?

Mr. Wooden: I just want to emphasize Your Honor's request, and make it my own, that Counsel for the Respondent specify in the record, on the record, any other portions of this subject matter—

Trial Examiner Norwood: Yes.

Mr. Wooden: —that they think ought to have been included in my motion to strike,—

Trial Examiner Norwood: Yes. Well, I think they should do that.

Mr. Wooden: —and I—

Trial Examiner Norwood: And I shall ask you for further study of this situation and a statement Tuesday morning, if you wish to make it, and that is before you—

Mr. Werle (Interposing): Your Honor, then, is not ruling at the moment on our motion to reinstate,—or are you?

Trial Examiner Norwood: No, I stated that I see no reason why it should be denied, but if Mr. Wooden's statement on Tuesday morning reveals something that should change that decision, I shall be guided by it.

Mr. Brick: We would appreciate Your Honor

35971 giving it further consideration.

Trial Examiner Norwood: Oh, yes, I shall.

J. L. NELSON thereupon resumed the stand and testified further as follows:

Direct Examination by Mr. Withrow.

Q. Mr. Nelson, I show you Respondents' Ex-
35972 hibits 2609-A to Z-64, and ask you to tell us what it is (handing documents to witness)?

A. These are records that I kept while I was in the Pittsburgh office. They consist of quotation forms that we used in sending out our quotations, and I have indicated in ink the basis on which we predicated our destination prices.

Q. Now, Mr. Nelson, would you look in the upper left-hand corner of this Respondents' Exhibit 2609-A, and tell me whose handwriting that is (handing document to witness)?

A. That is my handwriting.

Q. Would you just go through and tell us whose handwriting it is on the various sheets in there, if it is—

A. Do you want me to take each exhibit and tell?

Q. Go through and tell us the handwriting of anybody that does not happen to be yours.

A. (Witness examines documents) The handwriting on Exhibits 2609-A to 2609-V, inclusive, are in my handwriting.

The handwriting in Exhibit 2609—I guess that is X—is in Walter S. Wing's handwriting.

Q. Was he associated with you at that time?

A. He was associated with our company at that time, and he has addressed this memorandum to me, personally, and I put it with my other records.

Exhibits 2609-Y to Z-59 is in my handwriting; 2609-
Z-61, that is in Mr. Affleck's writing, addressed to
35973 Mr. B. H. Rader; and the last exhibit has no writing on it of any kind; it is merely a blank form that we were using.

Q. And who was Mr. Rader, at that time?

A. Mr. Rader was the eastern sales manager.

Q. And you were—

A. I was assistant eastern sales manager.

Mr. Withrow: Will you mark these papers for identification.

The Reporter: Your Honor, these are marked for identification "Respondents' Exhibits 2610-A through G."

Trial Examiner Norwood: Thank you.

(The documents were marked for identification "Respondents' Exhibit 2610-A to 2610-G.")

By Mr. Withrow:

Q. Mr. Nelson, I show you Respondents' Exhibits 2610-F and G, for identification, and ask you if this is a memorandum prepared by you (handing document to witness)?

A. Yes, sir.

Q. And I show you Respondents' Exhibit 2610-A to E, and ask you if this is the material which is referred to in the second full paragraph on Respondents' Exhibit 2610-F (showing documents to witness)?

A. Yes, this appears to be the—and as far as I can see—is the price memorandum that I prepared in reply to a request that we received from Mr. Lindahl, and was
35974 prepared under my personal direction.

Q. What information was this prepared from?

A. It was prepared from the records that we had in our office at that time.

Q. And who was Mr. Lindahl?

A. Mr. Lindahl was our auditor, at that time.

Mr. Withrow: I offer at this time, Your Honor, Respondents' Exhibits 2609-A to Z-64 (handing documents to Mr. MacIntyre).

Examination on Voir Dire by Mr. MacIntyre.

Q. Mr. Nelson, referring to Respondents' Ex-
35975 hibits 2609-A to Z-64, are there any prices shown on there that are not shown in your testimony, which was received here by His Honor this morning, and which appears on pages 35879 to 35891, inclusive (referring to official record)?

35977 Q. Mr. Nelson, can you state whether or not the terms and conditions appearing in Respondents' Exhibits 2609-A to Z-64 are the same or different from the terms and conditions in effect and used by competitors of that company as of those dates?

A. These terms are substantially the same as—so far as I know—as those used by our competitors, with one exception, and that is the sack charge. We included the sacks in our price to the customer at 10 cents each, and gave him

full credit of 10 cents but provided they were re-
35978 turned to us in good condition and could be used again.

By Mr. MacIntyre:

Q. Do you say now—

A. (Continuing) Our competitors at that time were following the practice of only allowing 7½ cents, or 30 cents a barrel for the return of their cloth sacks.

Q. Do you say they are the same in all other respects (referring to documents)?

A. The terms of discount, and the other terms, I say, are substantially—now, I can't say word for word without having a copy of their terms to compare it with.

To the best of my knowledge and belief they are about the same.

35979 (RESP. EX. 2609-A to 2609-Z-64, was offered and received in evidence.)

Direct Examination (Continued) by Mr. Withrow.

Q. Mr. Nelson, would you tell us whether or not you have any agreement with your competitors that you will sell only on a delivered price basis?

A. None whatever.

Q. Now, has the Federal Government ever asked you for f.o.b. mill prices?

35980 A. Yes.

Q. Are there any specific instances that you recollect?

A. Well, I recall this so-called Good Friday bid, and the one that was issued a short while later.

Q. And this Good Friday bid was a bid in April, 1938?

A. To the best of my recollection, yes.

Q. And did you bid on that inquiry?

A. No, sir; we did not.

Q. Would you tell us your reasons for not bidding?

A. Well, there are a number of reasons. I suppose if I had that bid before me I could perhaps pick out
35981 out some of them.

The principal reason, as I recall it, was that they called for f.o.b. mill prices for delivery within certain zones. The quantity was not definite. It was not specific in any way. It occurred to me that we were bidding more

or less on an option rather than actual business, and after going over it carefully we decided that we were not interested in the bid.

Q. And when you say "we decided," whom do you mean?

A. I mean our president. I showed it to him and he agreed with me that we would not bid.

Q. Now, is the Federal Government a large customer of yours?

A. No. A very small customer. In fact, I do not even look upon them as a customer at the present time.

Q. Now, Mr. Nelson, have you ever received lists of base prices from your competitors?

A. No, sir.

35982 By Mr. Withrow:

Q. Mr. Nelson, I show you Respondents' Exhibits 2611 through 2629, and ask you if these are quotations from the files of the Wolverine Portland Cement Company.

A. Yes. These are quotations from our files.

Q. And will you tell us whether or not this constituted a portion of the price record which you found of the broadcasting of quotations in July, 1933.

A. Well, you understand, Mr. Withrow, I was not with the company in 1933. However, these were taken from our files and they appear to be what you said they are, quotations that were found in the field by the field representative from the company.

Q. And I notice here "F.C.M.," do you know who that refers to?

A. That is Frank C. Mooney, who was sales manager at the time.

Mr. Withrow: Your Honor, I offer in evidence these documents, Respondents' Exhibits 2611 to 2629, with the appropriate sublettering (handing the documents to Mr. MacIntyre).

Trial Examiner Norwood: Now, that is for the purpose of illustrating your method of picking up competi-

35983 tive prices in the field?

Mr. Withrow: No, Your Honor, that matter has been covered by the stipulation.

Trial Examiner Norwood: That is what I thought.

Mr. Withrow: And I am offering these because this is

some information about a price increase which Counsel for the Commission has put specifically in issue in this case, and we are attempting to bring all the facts to bear upon that increase that we can.

35985 Trial Examiner Norwood: These consist of price quotations of this company's competitors?

Mr. Withrow: That is right.

Trial Examiner Norwood: Which he found in the field and received them on the dates indicated hereon, and contains this company's statement in quotations made to meet that price?

Mr. Withrow: That is right.

Trial Examiner Norwood: I think that is covered by your general evidence.

Mr. MacIntyre: It is already in the record, that some action of that nature has been taken.

Trial Examiner Norwood: The objection is sustained. The Respondents have their exception.

35986 The witness identified Resp. Ex. 2630 as a particular sheet similar to other sheets that Wolverine has, showing its destination prices that it uses in quoting on different destinations in the State of Michigan and in the other territory in which it operates or is active. That is the first page.

Examination on Voir Dire by Mr. MacIntyre.

Q. As of what date were these prices?

A. Well, according to this sheet, it shows they were effective June 2, 1936.

Q. Were you with the company on June 2, 1936?

A. Yes, sir.

Q. Do you have any independent recollection concerning those other than what the sheet, itself, shows?

35987 A. No, I have not at the present moment, except that we have records on which we worked up those prices undoubtedly.

35988 (RESP. EX. 2630, was offered and received in evidence.)

By Mr. Withrow:

Q. Mr. Nelson, do you have any agreement with your competitors to quote the same terms of sale and discount?

A. No, none whatever.

The witness identified Resp. Ex. 2631-A as his letter, dated November 7, 1937, addressed to Wolverine salesmen to which he attached a copy of the company's sales
35989 policy, which was issued on June 1, 1935. On June 1, 1935 he was not with Wolverine, and he mailed this to Wolverine's salesmen on November 7, 1936 in order to refresh their memory and to show to them that the June 1, 1935 policy was still in effect. He was the person in the company who decided that this policy should remain in effect.

Examination on Voir Dire by Mr. MacIntyre.

Q. Mr. Nelson, referring to Respondents' Exhibit, for identification, 2631-B, will you tell me whether or not that is a duplicate of an announcement issued by your company around the middle of April, 1935?

A. I have no record of one on April, 1935. This is the only one that I found in the papers of Mr. Mooney.

35990 Q. Can you tell us whether or not it is the policy that was adopted even though not announced by your company as of April, 1935?

A. I cannot tell that. All I can go by is this policy here.

35991 Trial Examiner Norwood: Did you issue this circular there?

The Witness: I wrote that letter there in November.

Trial Examiner Norwood: The letter?

The Witness: Yes.

Trial Examiner Norwood: And you enclosed this other one?

The Witness: And sent each one a copy of that,—of the—apparently the original that we still had in the file.

Trial Examiner Norwood: And when you went to Wolverine, what time did you go to Wolverine?

The Witness: February, 1936.

Trial Examiner Norwood: And you found this policy in effect at that time?

The Witness: Yes, sir.

35992 (RESP. EX. 2631-A and 2631-B, was offered and received in evidence.)

Direct Examination (Continued) by Mr. Withrow.

Q. Mr. Nelson, will you tell us whether or not the Wolverine Company requires a prospective dealer to be sold by one of its competitors for you to sell him as a dealer?

A. Before we sell him, you mean?

Q. Yes.

A. No.

Q. Do you sell to some dealers which are not sold by your competitors?

A. Why, I presume we have some in our records. I am not sure we have. I have not any in mind now, but we determine these things for ourselves, to whom we will sell.

Q. Now, do you have any understanding with dealer associations concerning whom you will sell as a building material dealer?

A. No.

Q. Or any agreement with any dealers?

A. No.

35993 Q. Mr. Nelson, I show you Respondents' Exhibit 2632, for identification, and ask you if this was prepared under your supervision (handing document to witness)?

A. Yes, it was.

Q. Does that come from—the figures—from the books and records of the Wolverine Company?

A. It comes from the books and records of our company.

Mr. Withrow: Your Honor, I offer in evidence Respondents' Exhibit 2632 (handing document to Counsel for the Commission).

Trial Examiner Norwood: What does that show,—sales figures, did you say?

Mr. Withrow: I did not; but it does.

Trial Examiner Norwood: I see.

Mr. MacIntyre: I would like to ask the witness a question on voir dire, if Your Honor please.

Trial Examiner Norwood: Go ahead.

Examination on Voir Dire by Mr. MacIntyre.

Q. Referring to Respondents' Exhibit, for iden-
35994 tification 2632, can you tell me when that was prepared, Mr. Nelson (referring to document)?

A. Well, apparently this was prepared in September, 1939, because—or right after September, 1939—because it shows the first nine months.

Q. And prepared for use in this case?

A. I presume so, because it was prepared for our counsel; he asked for it.

35995 Trial Examiner Norwood: Yes. Does Counsel
35996 undertake and assume the obligation of making the supporting data available to the Government's Counsel?

Mr. MacIntyre: Here?

Mr. Withrow: Yes, in a way that is convenient.

Trial Examiner Norwood: Yes.

Mr. Withrow: To both sides, and to a company which is selling cement and operating as a business from day to day.

35997 (RESP. EX. 2632, was offered and received in evidence.)

35998 Q. Mr. Nelson, do you sell the W.P.A. direct or through dealers?

A. No, we sell them through the dealer only.

Q. Mr. Nelson, I show you Respondents' Exhibit, for identification, 2633, and ask you if that is a document which was received by the Wolverine Company (showing document to the witness)?

A. Yes, this is a letter that was received by our company, at our office.

Q. I notice down here it is stamped "May 20, 1937"; does that indicate the date when you received it (indicating)?

A. That is the date it was received.

Mr. Withrow: Your Honor, I offer in evidence Respondents' Exhibit 2633.

35999 Mr. MacIntyre: We object to Respondents' Exhibit, for identification, 2633 as incompetent, irrelevant, and immaterial; it is a writing of a third party setting forth some argument and statements of desires, and we have no opportunity to cross-examine him (handing the document to the Trial Examiner).

It is a letter that appears on its face to have been written, or purports to have been written more than two years ago, and—

Trial Examiner Norwood (Interposing): Yes; the objection is sustained.

Mr. Withrow: I would like to be heard on it, Your Honor.

It seems to me Respondents are entitled to put in evidence here through documents written by their customers.

Trial Examiner Norwood: To show what?

Mr. Withrow: As to what their customers' reactions are; not to prove the truth or the validity of the customers' position, but to show what position the customer has taken, and this document does show that, and it shows it graphically.

36000 By Mr. Withrow:

Q. Mr. Nelson, have you found that all of your competitors sell the W.P.A. through dealers?

A. No, that's not true; some of them sell the W.P.A. direct.

Q. Now, would you tell us your reasons for not selling the W.P.A. direct?

A. Well, I have always figured,—and I work on that basis,—that the W.P.A. cement business, that is, cement used on W.P.A. work, is work that would ordinarily be supplied through the local dealers. It may be city paving; it may be various other projects; but under ordinary conditions, and before the W.P.A. was in operation, that business was dealer business, and I have continued on that basis.

Q. Have your dealers ever made any representa-
36001 tions to you about selling the W.P.A., whether they wanted it through them or direct?

A. Well, I know this, that if I started selling them direct that I would hear plenty from them, because it has been our practice, and we are continuing on that practice, and I have talked to a great many dealers personally, and I know from my own conversations with them that they look upon that as their business.

Q. Mr. Nelson, would you tell us whether you find that your dealers from time to time protest, or make representations to you, about the manner in which you sell, whether direct or through the dealer?

36003 A. I cannot recall particularly that I have had any protests. I have, however, dealers who have called me up and talked to me about whether or not I was going to sell certain pieces of work direct or through the dealer, and if we were going to stick simply to our policy.

Q. Mr. Nelson, did you consider, or take any action, as to the result of these conversations with dealers?

A. No, we followed our policy.

Q. Did you tell your dealers—

A. We told our dealers our policy, and followed our policy.

Q. Did you tell him what you were going to do in these specific instances?

A. In those cases where I was asked specifically, yes.

36006 Q. Mr. Nelson, I show you Respondents' Exhibit No. 2635, and ask you to tell us what it is.

A. This is a carbon copy of a letter dated June 5, 1936, that I addressed to one of our sales representatives in Ohio telling him that we would meet the trucking competition as we found it in Ohio, in the six counties in Ohio—

36007 Q. Now, will you tell us, Mr. Nelson, under what circumstances that memorandum was written by you?

A. Up to that time there was trucking only in one county in northwestern Ohio, Lucas County, and the trucking was extended to take in five additional counties to Lucas County.

Q. And where did you get this information about the extension of trucking?

A. I have two sales representatives both of whom called me up and told me about what they found.

Q. Did you confer with competitors about that change?

A. No, sir.

36008 (RESP. EX. 2635 was offered and received in evidence.)

By Mr. Withrow:

Q. Now, after that time, in June, 1936, have you trucked to destinations in all of those six counties, Mr. Nelson?

A. To the best of my knowledge, we have. We have limited our trucking to within reasonable trucking distances.

Trial Examiner Norwood: Now, in that trucking, did you bill the cement trucked at delivered prices?

The Witness: Yes, sir.

36017 Q. Mr. Nelson, I show you Respondents' Exhibit 2638, and ask you if this is a paper from the

files of the Wolverine Company (handing document to witness)?

A. Yes, sir; this is taken from our files.

Q. And Respondents' Exhibit 2637 (handing document to witness)?

A. Yes, sir; that was also taken from our files.

Q. And Respondents' Exhibits, for identification, 2639 through 2642, were these also taken from the files of the Wolverine Company (handing papers to witness)?

A. Yes, these were taken from the files.

36022 Q. Mr. Nelson, I would like to have you look at these documents again, and tell us whether or not you ever discussed the contents of those documents with Mr. Jones of the Wolverine Company (handing documents to witness marked for identification Respondents' Exhibits 2639 and 2640)?

A. (Witness examining documents) Yes, I talked to Mr. Jones about both of these letters; he confirmed that he had written these letters to me.

Q. Did Mr. Jones represent to you those letters had been sent and were directed—

A. Yes, sir; they were in his own private records at that time, and, rather, I should say from his file. I might add to that, that we also checked up on our books to see what we had paid to the Institute.

Q. From these books and records?

A. And from the books and records that we were not members of the Institute.

Q. Did you find you paid that $500 initiation fee?

A. No, sir.

Trial Examiner Norwood: Did you find that any of this material which the Institute had been collecting and submitted to you on those dates, or do you know anything about that?

The Witness: As far as I know, it was all returned at the time they sent the first set of forms, and so

36023 forth.

36025 (RESP. EXS. 2637, 2638, 2639 and 2640 were offered and received in evidence.)

By Mr. Withrow:

Q. Mr. Nelson, would you tell us whether or not the Institute has ever attempted to get you, as an officer of the Wolverine Company, to exert price leadership or to refrain from price leadership?

A. No, never.

Q. Have the representatives of any cement companies ever attempted to get you to exercise price leadership?

36026 A. Never.

Q. Have you ever had any agreement with any of your competitors with reference to the price which you would charge for your cement?

A. No.

Q. Has The Cement Institute, to your knowledge, requested you to adopt certain policies and practices with reference to marketing cement?

A. No.

Q. Has it, to your knowledge, ever acted as an arbitrator of company marketing policies?

A. No.

Trial Examiner Norwood: Do you refer to the time when your company belonged to it, do you not, to the time you were an official on the Code; is that right?

The Witness: I refer to the time that I was associated with companies that were members of the Institute.

By Mr. Withrow:

Q. Did you, personally, Mr. Nelson, have any part in compiling the Institute's freight rate books?

A. No, sir.

Q. Does your office compare the rates in the Institute books with the tariff rates?

A. Do you mean since I have been with the company?

Q. Yes.

36027 A. We have checked some of the rates, but I would not say we have made a comparison of all of the rates.

Q. Have you any agreement or understanding with your competitors that you are to use the Institute freight rate book?

A. No.

Q. Whether it is right or wrong?

A. No.

36029 Q. Mr. Nelson, have you ever considered the problem of maintaining a separate traffic department for the Wolverine Company for the purpose of compiling and computing all of the rates that you need?

A. I have given it thought, yes.

Q. And would you tell us briefly your reasons for not establishing such a traffic department?

A. Well, one reason is that we find that these freight rate books that we get from the Institute are cheaper and in convenient form, and to duplicate that same information would be considerably—would cost us considerably more than we are able to get it from the Institute for. I consider these Institute freight rate books the same
36030 as any other service that we might buy. If I could not get those books from the Institute I probably would try to get them from some other traffic bureau. If I could not get them from some other traffic bureau I would hire a man and compile them myself, have him compile them myself, have him compile them.

Witness identified Resp. Ex. 2643-A and C as copies of letters Wolverine received from the Cement Institute; Resp. Ex. 2643-B as a Wolverine letter to the Cement Institute. These letters were concerned with a revision of the Ohio freight rate book.

36033 (RESP EX. 2643-A, 2643-B and 2643-C were offered and received in evidence.)

36034 The witness identified Resp. Ex. 2644-A to O as papers from the Wolverine files, which had been filed in connection with Resp. Ex. 2638.

36036 (RESP. EX. 2644-A to 2644-O were offered and received in evidence.)

By Mr. Withrow:

Q. Mr. Nelson, have you ever been in communication with Mr. Mallory, of The Cement Institute, about what the capacity of the two Wolverine mills should be, or was?

A. I never have; no, sir.

Q. Have you ever limited your production at Wolverine so as to conform to Mallory's capacity figures?

A. No, sir; I never have.

Q. Have you ever limited or curtailed production pursuant to any agreement with your competitors?

A. No, sir.

36037 Q. Did Mr. Mallory ever inform you what capacity he thought each of your plants had?

A. He never consulted me, and I don't know whether—I can't find out where he ever informed the Wolverine Company.

Q. Have you ever entered into any agreement with any of your competitors to allocate business?

A. No, sir.

Q. Now, this morning, Mr. Nelson, you made some reference to so-called Good Friday bids, and said that your testimony would be—your statements would be incomplete unless you saw a copy of the invitation. I show you Commission's Exhibit No. 1339 and ask you if you want to amplify the statement you made this morning.

A. Well, this appears to be the copy of the invitation that we received and which we considered.

Now, I would have to go over this very carefully and read the whole thing from beginning to end, to analyze it. I think my statement this morning is, so far as I can see, is complete enough.

36040 Q. Mr. Nelson, do your dealers generally maintain warehouse facilities for servicing the retail trade?

A. Yes, sir.

Q. Do any of your customers even ask you to quote them for delivery at a point where they do not maintain such facilities?

A. We have had such requests; yes.

Q. Do you quote them under such circumstances?

A. No; as a general rule we do not because there may be another dealer in the town, and our policy is not to sell a dealer except in his own home town or in his marketing area, unless he maintains a warehouse at that other point.

Q. Do your customers ever try to divert shipments of cement?

A. Well, I have known of cases where it has been done,
36041 but I have not any particular cases in mind where it has been done, since I have been with the Wolverine Company.

Q. Well, have you set up any machinery in the Wolverine Company to attempt to control it?

A. We have no machinery, except that if we knew that it was going to be diverted when we were selling that material or quoting on it, we would undoubtedly talk to the customers about our policy of not permitting diversions, because, as a rule, we are not in favor of diversions.

Q. Since you have been with the Wolverine Company, have you ever employed a stamp on the bills of lading, providing that the cement cannot be diverted?

A. No, sir.

Q. Will you tell us your reasons for your general rule against allowing customers to divert cement?

A. Well, one reason, of course, is that he may divert it into a town where we are selling another dealer, and in so doing he might get it at a lower price and sell it at a lower price than our dealer in that other town can sell it for, and, incidentally, it disrupts our relations with the dealer in the other town.

Q. Have you ever taken any measures, in cooperation with other cement manufacturers, in order to eliminate diversion?

A. No, sir.

36042 Q. Mr. Nelson, I show you Commission's Exhibit 911-C. There has been some statement to the effect that that is your handwriting. Is that your handwriting (exhibiting the exhibit to the witness)?

A. No, sir.

(RESP. EX. 2610-A to 2610-E was offered and received in evidence.)

By Mr. Withrow:

Q. Mr. Nelson, did you have anything to do with the discharge or firing of Mr. Cree?

A. No, sir; I did not.

Q. Were you informed of the fact that he was go-
36043 ing to be discharged?

A. No, sir; I did not know he was going to be discharged.

Q. There is testimony in the record that a dinner was given celebrating Mr. Cree's discharge—a sort of victory dinner. Did you attend such a dinner?

A. No, sir.

Q. Did you know in advance of getting information from your salesmen about a price increase around Saginaw and Bay City, Mich., in December, 1936?

A. No, sir.

Q. Did the Huron Company give you any advance information that it was going to install zone prices in January, 1937?

A. No, sir; it was news to me.

Q. Have you ever entered into any combination or conspiracy or agreement with any cement manufacturers, or anyone else, to restrict the specifications on the manufacture of cement?

A. No, sir.

Q. Now, when you first came into the business, Mr. Nelson, will you tell us approximately how much cement in the country was manufactured and shipp 1 from the Lehigh Valley?

36044 A. Well, I will tell you: My recollection is that it was at least 75 percent. Later on we used to talk about 50 percent of it being manufactured on the Valley, after we were in operation there for a few years as new mills began to spread throughout the West. Of course I took that from cement directories that we had at that time.

Q. Mr. Nelson, in your experience as a cement manufacturer, was there ever a time when there was a shortage of cement?

A. Yes, sir; a decided shortage.

Q. Will you tell us briefly when that was?

A. My recollection is that the shortage was in about 1921 or 1922, two years there. There was also a big shortage of cars. We took—I was then with the Universal

36045 Company—we took all of our salesmen off the road.

It was not a question then of selling cement. It was a question of how much could we give to each one of our customers, and we allotted, during those two years, our cement to our various customers. We were offered all types of prices at the time, but we maintained a minimum and a maximum price at which we sold the cement.

Q. Mr. Nelson, have you ever entered into any agreement with any cement manufacturers as to what mills should be base mills and what mills should be non-base mills?

A. No, sir.

Q. Have you ever entered into any agreement as to what figures a given mill should have?

A. No, sir.

36047 *Cross-Examination by Mr. MacIntyre.*

Q. Mr. Nelson, Mr. Withrow asked you if the handwriting appearing on Commission's Exhibit 911-C was yours, and I believe you told him that it was not. I will ask you to tell us whose it is.

A. I canot tell you that because I do not know.

Q. Did you have someone in the offices of The Cement Institute at the time you were working there, whose initials are those appearing in that handwriting?

A. Yes, sir; we had.

Q. Who are they?

36048 Q. Whose initials are those, Mr. Nelson?

A. Well, that is one of the girls that were posting the prices onto the cards. I cannot recall her name because we had two girls, I believe, whose initials started with "B".

Q. "L. M. B."?

A. "L. M. B." Yes, sir; I do know, however, it was one of the girls posting the prices on the cards. I can't recall her name. We had one girl, I think her name was B-o-l-t-z. The other girl, I cannot recall her name.

Q. Does that appear to be in Miss Boltz handwriting?

A. Well, I can't say that it is; no. It does not appear to me as being the same handwriting.

Q. Do you tell us that it is not?

A. No; I cannot tell you that it is not, because I am not an expert in handwriting.

Q. Well, you saw her handwriting.

A. I am identifying this on account of the initial that is on there, not as to the handwriting.

Q. That is L. M. Boltz?

A. I think that is the initial. I am not positive, 36049 because we had another girl by that initial.

Q. In whose handwriting is the word "file"?

Mr. Withrow: If Your Honor please, it is in no one's handwriting. It is a stamp. I do not see why we should waste time—

Trial Examiner Norwood: Wait a minute.

Mr. Withrow: He talked about "obviously killing time." I wonder what he thinks this is.

Trial Examiner Norwood: Let the witness answer.

Mr. MacIntyre: It is in handwriting. Mr. Withrow did not know which one I was asking him about, apparently.

A. I don't know whose handwriting it is. It is not mine.

By Mr. MacIntyre:

Q. There is also a stamp, carrying the words "File—J. L. N." Is that your file stamp?

A. That was a rubber stamp that I had, and it is quite possible that I stamped that.

Mr. MacIntyre: Thank you (handing the document to Mr. Withrow).

By Mr. MacIntyre:

Q. You have discussed at considerable length, Mr. Nel-

son, the fact that your company has freight rate books of The Cement Institute and to use made of your company of those books. Do you recall the testimony on that point?

A. I don't know that I discussed it—you say "great"—

36050 Q. I say, "at length."

A. At length? I don't know that I discussed it at length.

Q. Well, such discussion as you have made, you recall.

A. Yes, I recall having discussed it.

Q. What use did anyone in your company, and particularly your salesmen, make of the information contained in those freight rate books of The Cement Institute, which show freight rates from so-called basing points—that is, which were locations of your competitors' mills to various destinations?

A. Our salesmen are not supplied with those books. They have no copies of those books.

Q. Well, what use did others in your company make of that particular information?

A. We use those books the same as we would use any information that we can gather regarding our competitors. We want to know what their freight rates are to certain destinations, as well as our own. I have always gone on the basis that the more you know about your competitors' business, the better you are off in meeting competition.

Q. Why did you want to know what the freight rates were from your competitors' mills to any particular destinations?

A. Why, as I said before, I want to know as much about my competitors as I can, that operate in the territory in which I am operating.

Q. Now, why did you want to know that, or why
36051 did you want to have that particular information?

A. Because it is part of the natural—it is natural, to begin with. Incidentally, we also want to know that in connection with how they are running their prices, or what our competition is that we have to meet.

Q. Then, you want that information, as I understand you, so as to know how they determined their prices?

A. Yes, as far as we can, we find out what they are doing in connection with the prices they are quoting, and what we have to meet.

Q. Yes; how they determine their prices and what the prices are.

A. Yes, sir; in order to meet the destination prices.

Q. Now, a further question on that point, Mr. Nelson: I believe the record shows that all, excepting a very, very small percent of your cement, moves by truck from your plant to destinations in the State of Michigan.

A. A "small percentage," you say? I never said that.

Q. All but a small percentage moves by truck; is not that what your testimony is?

A. I perhaps said that a very limited amount of cement moves by cars in Michigan from our plant—not trucks.

Q. Well, that is what I said—all but a small percent does move by truck.

A. That is true.

36052 Q. That is what I understood your testimony to be.

A. That is true.

Q. And what is that percentage that moves by cars?

A. I would say last year, possibly five percent—somewhere between five—not over 10 percent; between five and ten percent, and nearer five than ten, by car.

Q. All right.

Now, as to this 95 percent that moves by truck of your total shipments, is there any information in The Cement Institute freight books that is of any assistance whatever to you, except for the purpose of arriving at the delivered prices that you use in quoting with respect to such truck deliveries?

A. Why, there is nothing in those freight rate books concerning trucking rates. They are all railroad rates.

By Mr. MacIntyre:

Q. The only way that you can use any information in those books with respect, then, to 95 percent of your

36053 business, then, is for the purpose of quoting prices; isn't that correct?

A. We use them as one of the bases on which we determine the prices, yes.

Q. And for no other purpose with respect to that 95 percent of your business?

A. Well, I would say yes, we have got to keep that information on hand all the time because we never know when we are going to be called on to ship carloads to any part of the State.

Q. But with respect to the manner in which you have determined your freight rate for shipping purposes when shipments are made by rail, you don't want to change your testimony that you have placed in the record yesterday and today, do you?

A. I wish you would state that again. I do not think I got that part.

Trial Examiner Norwood: Read the question.

Mr. MacIntyre: Read the question.

(Question read.)

A. I see no reason for changing it.

By Mr. MacIntyre:

Q. You well considered it before you gave it, of course.

Mr. Withrow: Your Honor, I object to this. This is not proper cross-examination.

Trial Examiner Norwood: I think he may ask him that on cross-examination.

36054 A. Well, I consider everything before I say it.

By Mr. MacIntyre:

Q. Mr. Withrow has shown you Commission's Exhibit, for identification, No. 1339, and asked you several questions as to why you did not quote on that invitation. Do you recall that?

A. Yes.

Q. Now, I show you Commission's Exhibit 1394, and ask you to state to us why you did not bid on that?

A. Well, I might state one or two reasons for that. In the first place, we do not solicit business in West
36055 Virginia. This invitation, incidentally, calls for different types of cement which we were not interested in competing on. In addition to that, it calls for mill prices, and we do not quote f.o.b. our mill.

By Mr. MacIntyre:

Q. Are there any other reasons, Mr. Nelson?

A. Well, that ought to be enough.

Q. Now, referring to your testimony which appears from lines 4 to 12, page 35915, I will ask you to state whether or not that is all that you can say as to your knowledge of any deviations made from published prices by your competitors?

A. Only this, that this is being called to my attention from time to time. I have not any specific case in mind at the present moment. If I had time, I could undoubt-
36056 edly pick out cases, such as I have stipulated here in this stipulation.

By Mr. MacIntyre:

Q. But all that you can say about that situation, Mr. Nelson, is that you believed from the circumstances as you have outlined there that deviations were made—

A. Yes, sir.

Q. —in some cases, in some circumstances, such as these you have outlined, came to your attention?

A. Yes, sir.

Q. Which led you to believe—

A. That is true.

Q. —that deviations had been made?

A. That is true.

Q. That is all you had?

A. I would say offhand that is all, without having to refer back to some individual quotations, possibly, or reports that I had.

Q. Well, can you cite us any instance where you had a report of a price concession by one of your competitors?

A. Yes.

Q. What is the date of it?

A. I cannot give you the date. I can give you the year, and I could give you approximately the date.

Q. When was that?

A. It was in 1938.

36057 Q. Any others?

A. Oh, they have been coming—I have had them off and on, but this particular case comes to my mind because it was a large contract.

Q. Well, I want any between, say, 1932 and July 2, 1937, that you can recall.

A. I cannot recall a specific case at this moment, no.

Q. Now, referring again to this Commission's Exhibit No. 1339, to which Mr. Withrow referred you, you stated that it was your belief that the Government secured under that, if you had bid, an option to buy for its requirements over a period of three months without being bound to buy any particular quantity; is that right?

A. That is my recollection of that bid; yes, sir. The quantity was unknown.

Q. Haven't you submitted bids to block manufacturers and to State Governments for requirements over periods without knowing how much you would have to furnish them to fulfill those requirements?

A. Rarely. We generally know about what they would

use. A cement products plant, we have previous records to go on; ready-mix plants, we also have records on which we can base our figures.

Q. But if the operations should drop to 50 percent or to nil, what, they were before, you would not, of
36058 course—they would not have to order any new requirements—they would not have to order any under the requirements of the contract, would they?

A. No, under the requirements contract they would not be compelled to do it, but we guess pretty close on it.

Q. And the Federal Government requirement comes up to three million barrels, and they are asking you to bid on up to three million barrels under their requirements, and of course they could take just as the block manufacturer would take, what their requirements would be?

A. There wasn't any assurance they would take the entire contract, so far as I could determine, or that I would get a barrel of it, even if my bid was considered.

Q. One of the other reasons for not bidding there, was because it called for an f.o.b. mill bid?

A. That is one of the reasons; yes, sir.

Q. On direct examination you stated that some of your competitors sell for W.P.A. work direct. Will you please tell us who and when such sales were made?

A. In the State of Ohio practically all of the companies at the present time are quoting direct on W.P.A.

Q. Since what date?

A. I can't tell you that now, but I know that is the practice at the present time.

Q. Do you know that any of them did prior to the issuance of the complaint in this case?

36059 A. No, sir; I can't tell you that. All I can tell you is what we have done.

Q. Now, when you stated that you had no agreement with your competitors to quote the same terms and conditions of sale and discount as they quoted, you, of course, referred to yourself; is that correct?

A. I referred to our company; yes, sir.

Q. What company were you referring to?

A. I am referring to the Wolverine Company at the present time.

Q. I think your—

The Witness: Let me have that question again. Perhaps I did not get it all.

Mr. MacIntyre: Will you please read it?

(Question read.)

A. Yes, of course I referred to myself. I had no agreements of any kind.

By Mr. MacIntyre:

Q. You did not know, when you were with the Universal Company, back in Pittsburgh, in 1908 to 1913, of the agreement that Mr. Affleck and other officials of the Universal Company had with their competitors; did you?

A. I don't know that they ever had any.

Q. But you do not intend for your testimony to be here that they did not—

36060 A. I can't tell for Mr. Affleck.

Q. They were your superiors at that time?

A. They were my superiors, but I cannot testify for them.

Q. And, of course, you do not intend that the testimony that you have given with respect to the denial of agreements on your part to be to the effect that the Wolverine Company, through its officials, Mr. F. C. Mooney, and Mr. Jones, had no agreements with its competitors prior to your coming there; do you?

A. I have no idea what Mr. Mooney did. I cannot testify for Mr. Mooney, and I cannot testify for Mr. Jones, only that I am absolutely sure, from my conversations with him, that he has never had any agreements.

Q. Now, referring to your testimony, page 35919, lines 2 to 9, you stated there that a charge of freight is made to dealers who send their trucks to your plant for cement equal to the freight from your plant to their destination, and that this charge is made because of the increased cost of handling. Do you recall that?

A. We charge any dealers that come to our plant for cement, and there are very few of them—we charge them the destination price.

Q. For the reasons that you have stated here?

A. That is one of the reasons; yes. We discourage that small pick-up stuff. That is one of the reasons. And, incidentally, it is troublesome on our part to have to handle it.

36061 Q. Where dealers come to your plant for such deliveries in their own trucks, and where the railroad's freight rate, if delivery had been made by car,

amounts to 25 or 30 cents per barrel, you would say that your reason is still the same?

36062 A. We make no distinction. With any of our dealers that want to come to our plant for cement, our practice is to charge them the delivered price, if they come to our plant with their own trucks.

By Mr. MacIntyre:

Q. Now, Mr. Nelson, you have stated in your testimony, lines 15 and 16, page 35900, as well as again this afternoon, that building material dealers and contractors are well informed as to delivered prices quoted on cement; do you recall that?

A. Yes, sir.

Q. Have you ever attempted to inform them as to the basing-point price that you used in calculating the delivered prices?

A. We have never discussed the basing points with any dealers. All they have been interested in, to my own personal experience, has been price at their destination.

Q. Is it your testimony, then, or are we to understand that they are not informed as to the basing-point price?

36063 A. I did not say they were not informed. I never informed them, nor did I discuss it. Undoubtedly, they know something about it, maybe from competitors, but that I don't know. I do not discuss it. I only talk prices at destinations where we sell the material.

Q. While we are on that point, before the issuance of the complaint in this case, July 2, 1937, when you made deliveries by railroad cars to dealers, do they pay the freight to the railroad company?

A. No, sir.

Q. To whom did they pay the freight?

36064 Q. To whom do the dealers pay freight on such shipments?

A. They pay freight to the railroad for our account because we include the freight rate in our price when we quote them. We quote them the price at destination, and when we allow the freight to follow, and he pays the freight, he is paying only a part of our invoice in advance.

Q. What do you mean by the statement that they pay it to the railroad for your account?

A. Just that.

Q. Does the railroad make any accounting on that to you?

A. No.

Q. Does the dealer—

36065 Trial Examiner Norwood: Does the railroad bill it to you?

The Witness: In some cases we have consigned it to ourselves. I have known of cases where we consign it to ourselves, drawing on the customer, with the bills of lading attached, but it has been my experience ever since I have been in business, and I have been in it a good many years, even before I went into the cement business, and that has been the practice in other lines of business, to quote delivered prices, with freight allowed to destination.

By Mr. MacIntyre:

Q. But your general practice, previous to the issuance of the complaint in this case, was to consign it to the dealer?

A. We ship it to the dealer, and he pays the freight to the railroad, and we deduct it from our invoice.

Q. And any claims made for a loss in transit against the railroad company were made by you in his name?

A. Sometimes we have got dealers who handle that, themselves. In other cases we handle it.

Q. In their names?

A. No.

Q. That is, claims paid to you?

A. No, no, we handle it in our own name.

Q. But in some instances the dealer handled it directly?

36066 A. We would handle it; yes, sir; except in the case of some big institution that would have a traffic department. I know of one or two such cases.

Q. In their name?

A. I don't know what name they handle it in.

Q But you never got any accounting from the railroad company?

A. No.

Q. As to the settlement?

A. In the first place, I don't know that we have ever had any—I don't know that we have had more than one or two claims, possibly for some shortage or some broken sacks, or something like that. Those cases are rare.

Q. Now, on direct examination you were asked whether

you had any agreement with any dealer association as to which you will sell or not sell as a dealer. Do you recall that?

A. Yes, I recall that.

Q. I will ask you whether or not the Indiana Lumber Dealers' Association and the Michigan Lumber Dealers' Association, through their secretaries, have communicated with you and insisted that you not sell particular concerns as dealers?

A. I don't remember any communications from either of those associations. I have met the secretary of the Michigan Builders' Supply Association, as well as the secretary of the Michigan Lumber Dealers' Association.

I do not even know whether we discussed it or not,
36067 but it may have been brought up in the conversation, as to what they would like to have us do, but I have never made any agreement with any of them as to what we would do.

Q. That is, when you say you brought it up in conversation, you mean as to whether the particular concern should be sold as a dealer?

A. No; not any particular concern—just as a general proposition.

Q. Whether particular classes of concerns should be sold as dealers?

A. That is it.

Q. And that was Mr. Eckley?

A. Mr. Eckley is secretary of the Michigan Builders' Supply Association.

Q. That is the man that you were referring to?

A. That is the one I know.

Q. Mr. Sulzer, is it, of Indiana?

A. Well, Sulzer is a dealer at Fort Wayne, but he is not secretary of the association. A man by the name of Slagle is secretary, at Indianapolis.

Q. You have talked to Mr. Slagle in the same manner that you talked to Mr. Eckley?

A. Oh, I have met Mr. Slagle on a number of occasions at conventions of their dealers, and at other places;
36068 in hotel lobbies.

Q. And discussed the same matters as those you discussed with Mr. Eckley?

A. I do not know that I discussed it even with him. I say it is quite possible he may have talked to me about it.

but I don't remember having brought up that subject as a particular subject to talk about, because I would see a man and meet him, we may talk about a lot of things; but I have never had any agreement with any of them as to what we would do or to follow out any policies of theirs.

Q. Well, you were acquainted by those gentlemen with their policies?

A. I do not know that they have ever acquainted me with their policies, no.

Q. Mr. Slagle never acquainted you of his policies of attempting to have all manufacturers sell all goods—that is, building materials—through dealers?

A. I cannot recall ever having received a letter from him since I have been with the Wolverine Cement Company, nor do I know that we have discussed that as a general proposition.

Q. Now, Mr. Nelson, calling your attention to your testimony as appearing from lines 3 to 19, page 33908, you have received requests for f.o.b. mill bids from the departments of the United States Government, the names of which appear in that testimony, haven't you?

36069 A. We have received requests for f.o.b. mill prices from the Government, but I do not say that these departments that we have mentioned, from whom we have received requests, have requested mill prices.

Q. Well, how can you state that their usual practice is to request f.o.b. destination prices if you don't know if they have requested—

A. Because my experience has always been most of the inquiries we have received at our office have been for destination prices. It is only recently that they have been requesting f.o.b. mill prices.

Q. Well, we do not then take this as your testimony that these particular departments have failed to request f.o.b. mill prices, do we?

A. Have failed to request?

Q. It is not your testimony that they failed to request?

A. My testimony is that I am not saying that those companies have requested mill prices, or departments, departments of the Government.

Q. And neither is it your testimony that they have failed to request it; is that correct?

A. My recollection is that in most cases they have not requested mill prices.

Q. I am asking you if it is your testimony that they have failed to ask your company for f.o.b. mill prices?

36070 A. I do not know whether they failed or not.

Q. You are not saying they have failed?

A. Hell, no.

Mr. MacIntyre: I will make one motion right now, then, so we won't have any later controversy about that.

I do move that the statements of the witness as appearing in lines 3 to 13 page 35915 be stricken from the record. The cross-examination has developed that it is only a belief of the witness that deviations were made by his competitors from their published prices, and that his belief is based solely upon the matters as set forth in that particular testimony, and it is my contention that the basis as set forth there renders the testimony as it appears there incompetent, irrelevant, and immaterial.

36071 *Redirect Examination by Mr. Withrow.*

Q. Mr. Nelson, that motion was about the deviation from published prices. You might just glance at it a moment (handing a copy of the transcript to the witness).

Now, would you tell us whether or not that statement there is based upon your knowledge and experience with the Wolverine Company?

A. I would say it is, yes.

Q. And the matters come to your attention in the regular course of your business?

A. They come to my attention; everything in the sales department comes to my attention.

Q. Over the course of years were you familiar at the time with specific instances?

A. At the time I was, yes, as these things were brought to my attention.

Q. Now, with reference to this question of truckloads on these dealers that do come to your mills with their own trucks, what size orders do they usually ask for?

A. Oh, they are for probably fifteen or twenty barrels; twenty-five barrels; very small quantities, and, as a general rule, they only come late in the fall and during the winter months, and from nearby dealers.

Now, Mr. MacIntyre asked you about Mr. Affleck

36072 and what he did. Did you mean to infer that Mr. Affleck had agreements on any of these matters?

A. No, I did not mean to infer that because how should I know?

Q. You just don't know?

A. I don't know.

36073 Mr. MacIntyre: Referring to page 35906, lines 15 to 20, inclusive, the witness there has made a statement that a certain result would not be brought about if he should do something. It is, therefore, a conclusion and speculation, and I move to strike it. It is not based on experience, and if Mr. Withrow would care to try to make such things competent before the witness leaves, I am giving him notice now that he should do so if he thinks he can.

By Mr. Withrow:

Q. Mr. Nelson, have you ever experienced a reduction in price since you have been in the cement industry?

A. It seems to me we have had nothing but reductions, more or less.

Q. All right. Would you tell us one of the reasons for reductions up in Michigan, whether or not that reduction drove any competing companies out of the market?

A. Positively not.

Mr. MacIntyre: Just a moment. That point does not answer the material asked to be stricken, and neither does it the material appearing in lines 23 and following on

36074 page 35913. I move that it also be stricken for the same reason; that is, the witness speculates.

Mr. Withrow: What is the last one again?

Trial Examiner Norwood: What is your last one?

Mr. MacIntyre: Lines 23 and on to the end of the page, and the top of the following page.

Mr. Withrow: You gave us the page; we would like to get it all.

Mr. MacIntyre: Page 35913.

Trial Examiner Norwood: Give us the page.

Mr. MacIntyre: Page 35913, beginning line 23, and continuing over to the top of the following page.

I move that also be stricken because it is a conclusion of the witness as to what reductions in price bring about, when any one of fifty factors would probably bring about the result that he has in mind.

By Mr. Withrow:

Q. Mr. Nelson, would you read this material on record page 35913, the last three lines, and tell us whether that statement is based upon your experience?

36075 A. Yes, sir; that is based on my experience.

Q. And have there been actual instances where you have observed that, those results?

A. I have noticed that throughout my whole experience in the cement industry.

Q. If Counsel for the Commission wanted you to particularize, could you give them some specific examples?

A. Why, as a general rule, where there is a price reduction, the purchaser is expecting further reductions, and is holding off purchasing, and he only buys what he needs in anticipation that possibly he might get a further reduction. When the price goes up, on the other hand, he is trying to get under cover with all the low price cement he can to protect himself against an increase in price.

Trial Examiner Norwood: Now, he asked you if you had any actual experiences to that effect.

By Mr. Withrow:

Q. How about the reductions and increases in Michigan in the spring of 1937, would that apply to that reduction in January and April, 1937?

A. To what I have just said?

Q. Yes, sir.

A. Yes.

36076 A. I do not think that the price up or down affected it one iota. In the first place, in my opinion, cement has always been sold at a very low price. My opinion is cement is the cheapest thing you can buy that is used in the construction of a building, and I do not think a five-cent reduction or a ten-cent reduction or a twenty-five cent reduction in the price of the cement to the consumer will make one bit of difference whether he builds the house or not.

Q. That is only your opinion?

A. Not only my opinion, but my knowledge, because he uses only an average of 25 to 50 barrels in a home, or only an average of $12.50. If you can tell me that $12.50 is going to keep a man from building a house, I am crazy.

36079 Washington, D. C.
April 9, 1940.

36080 Trial Examiner Norwood: The hearing will come to order.

Now, there are some motions here to dispose of.

The last one on the record there is Mr. MacIntyre's motion to strike certain parts of that last stipulation and certain parts of the testimony of this last witness.

Mr. Werle: That is the witness Nelson.

Trial Examiner Norwood: J. L. Nelson. And there are several motions there preceding the motion appearing on pages 36073 and 36074 of the record; and these motions are all denied, except as to a certain matter which is purely opinion evidence, and as to that matter the witness' testimony on pages 36076 and 36077 indicates that this matter in the stipulation and as testified to is purely opinion matter.

So the matter to be struck is record page 35906, lines 15 to 20, inclusive.

Record page 35913, lines 23 to 25.

Record page 35914, lines 1 to 5, inclusive.

Record page 35915, lines 3 to 13, inclusive.

36081 Also strike record 36076, line 25, and 36077, from lines 1 to 12, inclusive.

Mr. Werle: In Mr. Withrow's absence, Judge, I except to those rulings, and it may be that he may have something that he would like to say about that.

Trial Examiner Norwood: Yes. I have considered that fully and studied it over the week end. I think any discussion can be made before the Commission. We have to take this testimony and record the objections, motions, and the legal grounds therefor, and not to record discussion, except statements of contentions which are on important points from time to time.

Regarding the motion of Mr. Werle, which appears on record 35948, and following, I have both heard and studied in the record Counsel's statements in support of reinstating the evidence of Mr. Charles F. Lewis, of the Volunteer Portland Cement Company, relating to costs.

Striking this would involve the reinstatement of much evidence—I mean, reinstating this evidence would involve the reinstating of much evidence struck out or withdrawn.

In my opinion, there is no issue of reasonableness of price in this case.

Evidence of costs as bearing on the fairness or reasonableness of the prices maintained by any particular Respondent is irrelevant and should be excluded. Nor
36082 do I think that costs and profits are necessarily involved in the issue of public interest. If they were, the evidence struck, which includes matter produced by both sides, is incomplete and unsatisfactory.

The motion is, therefore, denied.

We shall continue to exclude evidence of this character, and if the Commission should hereafter decide that costs and profits studies are necessary to a satisfactory determination of this controversy, both sides should furnish complete data that will reflect the cost and profit situation in the entire industry.

Counsel for Respondents are free to move the striking of any other evidence of this nature which may have been overlooked.

Mr. Werle: As to that, if Your Honor please, if course we except to Your Honor's ruling.

Trial Examiner Norwood: Yes.

Mr. Werle: And at this time I think it would be in order for us to be advised as to the relevancy of Mr. Wooden's evidence, or the Government's evidence, which relates to the Tennessee Valley Authority episode in its entirety.

By that, if Your Honor please, I have reference to 247 pages of Government exhibits on that subject alone
36083 relating to nothing else but Tennessee Valley Authority, and in addition to that some hundred or more pages of testimony by Dr. Morgan and others.

I do think that, in view of Your Honor's statement that there is no issue as to fairness of prices and reasonableness of prices and relation of costs to prices in this case, that then we are entitled to know on what grounds that evidence which is in the record remains there.

Trial Examiner Norwood: Yes.

Mr. Wooden: Yes.

Mr. Wooden: I think that has been clearly stated before this, Your Honor. On motions we did strike everything relating to costs of T.V.A. or in connection with the T.V.A. matter, and the fairness of prices to T.V.A., we still hope

that the T.V.A. episode, if it may be called that, illustrates the joint and concerted nature of the activities of the group of Respondent Companies in their fixing or determination of the price to T.V.A. It is shown clearly that of course it was done by negotiation with T.V.A., but nevertheless it is an instance of concerted activity regarding prices.

Trial Examiner Norwood: These Respondents were negotiating with their Government on this matter, were they not? I think those negotiations were at the invitation of the Government.

36084 Mr. Wooden: I do not know that I concede that, Your Honor, as far as that is concerned. It may well be argued that it was instigated by the Respondents and the Government authorities fell in line with that.

Mr. Wooden: To go back to the original documentary record on that, I think it is arguable either way.

I intended to say, if I did not say a moment ago, that the fairness of the price of T.V.A. was not in issue and is not in issue in this case so far as evidenced by costs or profits or earnings. Whether it is fair as a result of concerted activities, of course, I adhere to my original position on that; but concerted activities, if in violation of the law, of course, necessarily make the price growing out of those activities unfair.

Trial Examiner Norwood: I want to confess this, that at that stage of this procedure I thought it was the theory of the Government—at least that the Government was undertaking to show the price as a symptom of monopoly, which they would have had a right to do, and I thought they were proceeding to put price in issue, but what has developed since that has convinced me to the contrary.

Mr. Wooden: Of course, we had prices in this, and the methods by which prices were determined. That is, of course, the whole case.

36085 Trial Examiner Norwood: Yes. I mean reasonableness of price.

Mr. Werle: Well, that was the Government's theory at that time, if Your Honor please; and I also submit that that evidence is still in the case. Now, that is our problem.

Frankly, we are not trying to be technical here. We don't care one way or the other. But we do want to know, and if it is going to be in for Mr. Wooden, if there is enough for him to argue or to let a court infer, then all

we ask is to be entitled to meet it, and the only way to meet it is by direct evidence.

36086 Trial Examiner Norwood: Now, in regard to these proffered exhibits of the Commission here, Commission's Exhibits 3235, 3236, and 3237, for identification, the Respondents have lodged lengthy objections to them.

Mr. Wooden: Your Honor, in that connection, I did want to ask the privilege of making a very brief statement in connection with the motions as made and particularly as spread on the record before Your Honor rules.

36087 Trial Examiner Norwood: Go ahead.

Mr. Wooden: With regard to Mr. Hershberger's objection to the receipt of these exhibits, because he says the Portland Cement Association was not in existence between 1903 and 1915, the period to which these minutes relate, I wish to call attention to the fact that the Portland Cement Association was a voluntary organization, and Mr. Affleck, its first president, as I recall, stated that it was only a change in name that took place in 1915 whereby the Portland Cement Association succeeded to the activities and affairs of the Association of American Portland Cement Manufacturers; and I also call attention to the fact that a number of the present Respondents in this case were active in the affairs of the Portland Cement Association under both names, the Association of American Portland Cement Manufacturers and the Portland Cement Association.

I wish to say that these exhibits were not offered solely to impeach Mr. Affleck, but in rebuttal of his and other defense witnesses' testimony, other witnesses who have preceded him. I refer particularly to Mr. Coogan and Mr. Brobston in that connection, and Mr. Boyd.

These exhibits were also offered not only in impeachment of the personal testimony of Mr. Affleck, but in impeachment of his testimony regarding the activi-

36088 ties of the Universal Company, with which he was prominently connected, and the activities of the cement department of the Illinois Steel Company, with which Mr. Affleck was prominently connected, and which preceded the incorporation of the Universal Company.

As to Mr. Brick's contention that it is necessary to prove these minutes by testimony of the persons who wrote them

in the first instance, that might be the rule with regard—and probably is the rule with regard to minutes that are not the minutes of parties to the controversy. And in that connection these minutes are in the position or in the category of admissions of the parties, of records made and in their control, custody, and possession, and they are offered as admissions.

Mr. Brick: If Your Honor please, I do not appreciate the significance of Mr. Wooden's attempted distinction between his endeavor to prove minutes of the particular organization, on the one hand, and his proof of statements which he points out constitute admissions, on the other. There is no difference with regard to methods of proof. He has to prove the documents. It might be he can prove them as minutes or he can prove them as statements having been made, but in any event he is trying to prove declarations.

Now, as I understand it, there is no contention on
36089 his part that he is trying to impeach the organization.

As he contends he is endeavoring to prove that certain declarations were made. He has not put anybody on the stand who knows anything about them.

And I do not see that there is any real distinction as far as the law is concerned, with regard to methods of proof. There is only one way of proving things, and that is to put witnesses on the stand to testify as to their knowledge.

Now, he has not made any comment with regard to the many other objections which were directed to these particular exhibits. He has not explained why he did not point out what particular statements he claimed constitute admissions with regard to any witness. He has not pointed out what particular parts of the excerpts he claims to be a subject of impeachment with respect to any testimony. He has not even pointed out the testimony in the record which he seeks to impeach.

So he not only has not proved that any declarations were made, he has not even pointed out what declarations he claims constitute admissions. And, as Your Honor well knows, those excerpts report the minutes of an organization which we know was not the P. C. A. organization, and even the P. C. A. organization is not a Respondent; and
36090 those statements are attributed to eighty some odd companies, and Your Honor is acquainted with the great number of companies, I think it is over seventy-five

included in those minutes, which are not Respondents in this case.

Trial Examiner Norwood: I do not think there is any point whatever to that.

Mr. Brick: To what?

Trial Examiner Norwood: There is a meeting here to make an agreement, and you happen to have an outsider at the meeting, and you think that would invalidate—I mean, render it impossible to put those minutes in evidence because there was an outsider there.

Mr. Brick: I am afraid I have not made myself clear.

First of all, we do not have the minutes; we have excerpts.

Trial Examiner Norwood: Yes, I understand. I was just going to that last point. In that list of—

Mr. Brick: Non-Respondents.

Trial Examiner Norwood: —non-Respondents in there, I do not think there is anything to that.

Mr. Brick: Well, let me explain.

Trial Examiner Norwood: I thought once it was an interesting point when you raised it, but—

Mr. Brick: Well, let me explain this point, which 36091 may have been overlooked.

These excerpts constitute a series of statements which are claimed to have been made in the course of meetings. Those statements are attributed to people who are not in any way related with this case. Now, they may be admissions against strangers to the proceeding, but what bearing has an admission of a stranger to this proceeding on a party connected with the proceeding?

Trial Examiner Norwood: I think it might be circumstantial evidence to show how certain of the methods were developed, and as I understand that was one of the purposes of the offer.

Mr. Brick: Well, let us put the man on the stand and let him be cross-examined. Those statements are no more binding than Your Honor's statement would be.

Trial Examiner Norwood: I think there is a difference there.

Mr. Brick: I cannot see any at all.

Trial Examiner Norwood: Where the whole story is in your possession, you may tell the remainder of it if you want to.

Now, if it is in his possession, and he has offered some piecemeal excerpts, why, I should reject them instantly, but

as the remainder of the minutes and any further in-
36092 formation connected with them that it is possible to obtain are in your possession, it puts the matter on a different status.

Mr. Brick: Well, I appreciate it does put it in a different status, but the difference is this, that instead of our being able to come in here and complete the story he selects a period of time between 1903 and 1915. You haven't seen them offer any minutes of the Portland Cement Association since that time.

It is a direct effort on the part of the Government, as I see it, to place upon us a burden which they know could not possibly be fulfilled because of the remoteness of the statements which have been made. They are not only remote in time but they are entirely unrelated to the proceeding, and they are not in any way connected with any of the Respondents in this case with the exception of the two witnesses whom he mentioned, and he has not proved them as to them.

Mr. Wooden: Your Honor, I want to say again that these were offered partly in rebuttal of the testimony of Respondents' witnesses about the alleged natural evolution of some of these practices we are dealing with in this case. They are offered before they get through their defense testimony so that they may meet it in the further course
of their testimony if they wish, and it is fairer to
36093 them that they be offered and received at this time than it would be as part of our rebuttal case.

Mr. Brick: If Your Honor please, if they were confined to statements made by officers or representatives of Respondents, why, all of our objections, of course, would not apply, but I say that in bringing in the statements of these strangers to the proceeding, people who are connected with companies having no relation to any of the Respondent Companies, that it is just the same as though we were bringing in an encyclopedia, except that he does not have the truthfulness attached to these statements that he would have to those.

Now, we have been deprived of an opportunity to examine the people who are supposed to have made these statements, not only with respect to whether or not the statements were made, but as to whether or not they are true.

Trial Examiner Norwood: Well, now, gentlemen, we have had enough discussion on this.

Now, in regard to the proffer, that is Commission's Ex-

hibits, for identification, 3235-A to Z-114; 3236-A to Z-107, 3237-A to H, I have carefully considered the objection of Mr. Hershberger, record page 35440 to page 35446, and Mr.
Brick's objections appearing intermittently on pages
36094 35446 to 35469, and continued at page 35623 to page
35629, and I have also considered the discussion of counsel on that.

Now, I cannot agree with the objections that these documents were not sufficiently identified, record page 28116 to page 28133, which I have studied carefully, indicates that they are verified copies of excerpts of the minutes of meetings attended by members of the cement industry, including some of these Respondents.

This verification is sworn testimony and no offer is made to refute the statements of the witnesses thereon, and I think the identification is sufficient to indicate such a degree of reliability as would justify their receipt in evidence.

I make no attempt to pass upon the weight of this evidence; many of these arguments would go to the weight.

Mr. Brick: May our exceptions be noted?

Trial Examiner Norwood: Now, the exhibits named are received in evidence at this time, and the objections are overruled and the Respondents have their exception.

(COM. EXS. 3235-A to 3235-Z-114, 3236-A to 3236-Z-107, and 3237-A to 3237-H, were offered and received in evidence.)

Mr. Brick: It is not necessary for us to point out any
disagreement which we might have with the state-
36095 ments which Your Honor has made, I take it; that is,
I think there are definite statements of fact contained in Your Honor's comment with which we disagree.

Trial Examiner Norwood: No. I made a statement as to what the evidence convinced me of at the time. Of course, you except to that.

Mr. Brick: Yes, not only to the ruling but to many parts of the statement made as bearing upon the reflection of the record.

Trial Examiner Norwood: What parts?

Mr. Brick: Well, Your Honor said many of the statements made were made by representatives of Respondent Companies.

There have been only three witnesses in this case who are representatives of Respondents and who have testified. That is one point.

Trial Examiner Norwood: I said some of the Respondents. Isn't there more than one?

Mr. Brick: Yes, there are three out of about four hundred.

Mr. Wooden: More than three.

Trial Examiner Norwood: Yes.

Well, now, the counsel may argue that to the Com-
36096 mission. There is no use arguing it to me. I made my statement there after considerable study.

Mr. Brick: Well, I just did not want to be silent if I had a duty to speak.

Trial Examiner Norwood: Yes. Your exception covers everything about that.

E. W. McGOVERN, called as a witness for the Respondents, being first duly sworn, testified as follows:

Direct Examination by Mr. Werle.

I am associated with the Hermitage Portland Cement
Company, Nashville, Tennessee. I am sales man-
36097 ager. I have been with Hermitage ever since they started operating. I have been sales manager since the beginning. Prior to my association with Hermitage, I was salesman for the old Dixie Portland Cement Company. I came to Hermitage in July, 1923, although they did not start shipping until May, 1924.

At that time Hermitage had some distributor arrangements for selling its products. When Hermitage started they had a sales contract with T. L. Herbert, Jr.; and T. L. Herbert, Jr. in turn turned that over to T. L. Herbert & Son who were building supply dealers, sand and gravel dealers, and brick manufacturers; and they handled complete sales. I was in charge of the Hermitage sales that were made by T. L. Herbert.

While I was with the Dixie Company I was a sales-
36098 man in the field. I started covering Florida. I was in Florida for approximately a year and a half. Then I covered the Carolinas, part of Georgia, then all of Georgia, then part of Tennessee, and then all of Tennessee.

T. L. Herbert Sons handled the entire sales for Hermitage. They billed it, paid the salesmen, paid the traveling expenses, and paid the cement company twice a month for

the cement shipped. It was billed, though, as the Hermitage Portland. All letters and all bills were written on the stationery of the Hermitage Portland. It was handled, though, by T. L. Herbert & Sons. It was the exclusive sales organization.

We started shipping May 1, 1924, and it continued until May 15, 1930. During that period Hermitage did not
36099 have its own sales department. The area in which T. L. Herbert sold Hermitage cement covered the entire State of Tennessee, the entire State of Kentucky except a little of the eastern end, north Mississippi, eastern Arkansas, part of Georgia down as far as Atlanta, and North Carolina over as far as Asheville, the western end of North Carolina. As a building supply dealer in Nashville, T. L. Herbert carried another brand occasionally when they had to, but, of course, they confined all their effort to the sales of Hermitage. T. L. Herbert was not in competition with other distributors of a similar character. At that time I do not believe there were any other so-called distributors in that territory. T. L. Herbert Company sold Hermitage cement to dealers and contractors, just like we do as manufacturers now. They competed with other cement manufacturers. I believe the record shows that Hermitage
36100 has one cement plant at Nashville. Hermitage does not have any silos or warehouses or any other supplementary plants.

The plant that Hermitage is now operating was constructed by it. It was built in 1923; that is, finished in the first part of 1924. I would say on account of certain improvements we probably increased our capacity, but we put in no additional machinery. We put in a cooling unit. We have also put in some preliminary crushers, which has had a tendency to speed up the production. The factors which caused the company to make these improvements were improvements in the quality of cement, mainly finer grinding, harder burning, and of course the preliminary crushers were put in to obtain finish grinding. To compete
36101 with other cements on the market, it was necessary to have this finer grinding. In other words specifications were gradually improving in early strength and workability. I would say that those questions of early strength and workability have been important to customers. I think that it is generally true that purchases have been determined from one company or another because of some one of those qualities.

As I remember, Hermitage operated at its full capacity for two years, about 1927, 1928, right in that neighborhood there. We have two kilns. I would say that in recent years both of these kilns were operated at full capacity not over 50% of the time. We have only been able to operate one kiln for the past, I would say, six or seven years. That is less economical than operating both of them continuously and then closing down. On account of dividing the labor, we tried to keep continually operating as far as possible, mostly to take care of the help.

36102 The witness identified Resp. Ex. 2646 as (a document showing) Hermitages total shipments of standard Portland Cement for each year from May 1, 1924 through 1939, and he vouched for the accuracy and completeness of the figures.

Examination on Voir Dire by Mr. Paulson.

Q. Mr. McGovern, have you for a period of years
36103 reported your shipments to the Bureau of Mines?

Mr. Werle: I am sorry. I did not hear it.

Trial Examiner Norwood: Read it.

(Question read.)

Mr. Werle: Oh, I object to that question. I do not think it has any materiality.

Trial Examiner Norwood: The objection is overruled.

The Witness: Shall I answer it?

Trial Examiner Norwood: Answer it.

A. Yes, sir. I think we have from the very beginning of operation.

By Mr. Paulson:

Q. Do you happen to know whether those figures that you have reported to the Bureau of Mines correspond with these figures?

A. I would say yes, sir; they do. I would not swear because I did not make up those figures, but they are supposed to be a duplicate of that paper there, and I think they are.

Q. When did you make this tabulation up, Respondents' Exhibit 2646?

A. It probably would be better for me to explain how we keep our records. Of course, that was copied from our records, and we did that, I would say, within the last 60 days.

Q. You made it up for this case?

A. For our attorneys; yes, sir. If you are interested, I could tell you just how we keep our shipments, each
36104 day's shipments.

Q. That won't be necessary, Mr. McGovern.

Mr. Paulson: We object to this document, Respondents' Exhibit 2646, for the same reason that we have heretofore objected to like and similar documents.

We have no objection if the Respondent Company will make available its reports to the Bureau of Mines at the Bureau of Mines.

We have to have something to check these figures against.

Trial Examiner Norwood: Well, that is one way. They could comply with the conditions that we have observed here with regard to these tabulations, or they could make their own books and records available to you for checking on that.

Mr. Werle: Well, I submit that Government Counsel is not interested, really, in books and records and checking these. What they are interested in,—and they have evidenced it from the past three months,—is the Bureau of Mines' figures.

Now, I, for the life of me, cannot see how those figures are any better for checking purposes than these figures. This man has testified, I think, that they both come from the same sources, and he has tried to explain to Mr. Paulson how he keeps these records, but Mr. Paulson
36105 did not want to hear that.

I think that objection is wholly without foundation.

Trial Examiner Norwood: Is their source—that is, the records from which you took that—is that open for the inspection of the Federal Trade Commission?

Mr. Werle: Oh, I dare say there is no objection to furnishing the—what would it be, Mr. McGovern?

The Witness: Just two small books.

Trial Examiner Norwood: In other words, you are putting in one—

Mr. Werle: There is no objection to that.

Trial Examiner Norwood: You are putting in one year's shipments, but suppose they want to see the shipments for other years.

The Witness: These are all the years since we started operating.

Mr. MacIntyre: Off the record, if Your Honor please.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

Well, I shall overrule the objection and receive the exhibit subject to this condition, either the records from which that tabulation was made that are retained in the office of the Hermitage Company, or the records in the Bureau of Mines be made available to the Commission for the
36106 purpose of checking.

(RESP. EX. 2646 was offered and received in evidence.)

By Mr. Werle:

Q. Now, Mr. McGovern, as to your shipments,—to shorten this,—they vary, do they, substantially from month to month throughout the year?

36107 A. Yes, sir.

Q. And that is so in every year, is it?

A. Yes, sir.

Q. And does that fluctuation from month to month and otherwise have any effect on the area, the marketing area?

A. Does it have any— I did not exactly understand what you mean.

Q. Well, does the fluctuation in demand have any effect on the area in which you will sell your cement, the area to which you will go?

A. Oh, no, no, that does not have any bearing on it.

Q. During your association with the Hermitage Company, has there ever been any arrangement among the manufacturers in your area and your company for sharing the business?

A. No, sir.

Q. And has the Hermitage Company had any arrangement with other Respondents to curtail or limit production?

A. No, sir.

36108 Q. Where is the principal office of the Hermitage Company?

A. Nashville, Tenn.

Q. And do you have any branch offices?

A. No, sir.

Q. Can you tell us, Mr. McGovern, what proportion of your shipments, on the average, in a year, are sold to the City of Nashville and its environs?

A. I would say from 10 to 20 percent.

Q. And do you have any way of stating what propor-

tion of the consumption in and about Nashville is furnished by your company?

A. No, sir. It would only be an estimate. I would say that we probably furnish around 75 to 80 percent of
36109 the cement in that immediate area.

The witness identified Resp. Ex. 2647-A, B. C as Hermitage shipments in 1937 within different zones in the vicinity of Nashville, in the territory Hermitage covers. It was prepared under his supervision from the shipment book, the current records of the company.

36110 The witness identified Resp. Ex. 2648 as a map showing the entire territory that Hermitage covers. He prepared most of it and the rest was prepared under his supervision.

The red line outlines the territory that Hermitage covers with salesmen. The blue lines show the territory in which Hermitage has the freight advantage. The circles are the zones which are referred to in Respondents' Exhibit 2647-A, B. C. They show 10 miles of Nashville, and then they go up to 25, to 50, 75, 100, 125, and 150 miles.

Trial Examiner Norwood: What are they offered to show?

Mr. Paulson: I was going to ask that, Your Honor.

Mr. Werle: They are offered to show the sales
36111 area of the Hermitage Portland Cement Company, the area where it has a trade advantage over competitor companies, and for a typical year, the places within that sales area where its cement has been sold and a portion of the amount of cement that goes into these various distances from its mills.

Trial Examiner Norwood: But to what questions does that go,—to what part of the issues?

Mr. Werle: I would think, certainly, Your Honor, it goes to the question whether or not this company is one of those for whom some distant mill is holding an umbrella, as some of the exhibits seem to indicate, or as the Government has argued. In other words, it shows where this company sells its cement and what its freight rate situation is, both of which questions, to my mind, are material and relevant in this inquiry.

Now, I do not know that I can explain at this point, I do not think I know fully exactly what use we might make of the information contained in that map, and in that tabulation of shipments, but I do think it bears directly on the issues in this case.

Trial Examiner Norwood: Well, don't you think that the Trial Examiner should know what issue it goes to before he receives any more of this kind of material in evidence?

36112 We have had a great deal of that just simply for the purpose of illustration. We have gone into what effect it would have to require mills to sell f.o.b., and whether that would create a local monopoly, and so on, and I do not think that it fairly goes to one of the issues; that is, to a substantial degree.

36119 (RESP. EXS. 2647-A, 2647-B, and 2647-C, and 2648 were offered and received in evidence.)

By Mr. Werle:

Q. Now, as I understand you, Mr. McGovern, when you were with T. L. Herbert, in some years you shipped to points beyond the red outline shown on this map; is that correct?

A. Yes, sir; that is true.

Q. And you no longer ship into those areas?

A. That is true.

Q. What is the reason why you do not any longer

36120 ship to such areas?

A. Well, we used to ship—I started to say "quite a bit"—some cement to New Orleans, and after a mill was built there, why, on account of the low price, why, we discontinued shipping into that territory.

When we were with Herbert, Herbert had an arrangement with Fisher Lime & Cement Company in Memphis, and they had quite a nice business in Arkansas; and after that arrangement was discontinued we could not get enough business in Arkansas to justify traveling it, so we discontinued traveling that area.

Q. Are you familiar generally with the Burns and Clark questionnaire?

A. Yes.

Q. Of your company, which is in evidence as Commission's Exhibits 972, 974, 976, with various identifying letters?

A. If I remember correctly, I did enter a part of that; other parts of it I am not so familiar with.

Q. As of the date of that questionnaire, 1935, were you shipping into Savannah and New Orleans?

A. No, sir. I don't believe we made any shipments into Savannah or New Orleans that late.

Q. How long is it since you shipped into these places, approximately?

A. It seems to me back about '29.

36121 The witness identified Resp. Ex. 2649-A and 2649-B as the companies that Hermitage regularly comes in competition with in the territory which it covers.

(RESP. EX. 2649-A and 2649-B was offered and received in evidence.)

By Mr. Werle:

Q. Mr. McGovern, coming to the question of your company's price policy and practices, do you sell Hermi-

36122 tage cement exclusively at delivered prices?

A. I would say with certain exceptions; yes, sir.

Q. Has there been any period during which you have been with the company that you sold all of your cement at delivered prices?

A. No, sir.

Q. As to selling at delivered prices, do you have any understanding—your company, I mean—or any cooperative arrangement with any other Respondent whereby you sell your cement in any particular way or by any particular method?

A. No, sir.

Q. Now, will you explain for us briefly why it is that you sell largely at delivered prices?

A. Well, the main reason is that most of our customers want it at points where they are either in business or are going to use cement. We have very few requests for other than delivered prices.

Q. What has been your observation, regardless of what the request is, as to the way in which the buyer buys? Does he buy at a mill price or does he buy at a delivered price?

A. As I say, practically all of them at delivered price.

Q. Now, when you were with T. L. Herbert & Sons, who is selling cement, as I understand it, you were the sales manager who was conducting the sales?

A. Yes, sir.

36123 Q. For that organization?

A. Yes, sir.

Q. What was your experience as to the requests by customers for delivered prices?

A. Well, practically all of our requests were for delivered prices.

Q. And during that period what was your practice as to the way in which you sold them? Was it the same?

A. Yes, sir; it was the same.

Q. Did T. L. Herbert sell Hermitage cement at a premium or prices of other brands?

A. No, sir.

Q. Did T. L. Herbert exercise leadership with respect to cement prices?

A. No, sir.

Q. What was their policy?

A. Their policy was just about the same as the policy we have today. We are price followers. We meet conditions as we find them, and either accept them or stay out of the market.

Q. Did T. L. Herbert make some sales other than at delivered prices?

A. We probably did to railroads and at the time of trucking; yes, sir.

Q. And how about the Federal Government?

A. Well, the Federal Government and State Gov-
36124 ernment—no, Federal Government only. States were always delivered.

Q. Now, in the course of deliveries to customers in trucks, I think you said—

A. Yes, sir.

Q. —how did T. L. Herbert determine the f.o.b. truck price?

A. We would take the price, the lowest price that we would find at a destination, and deduct our freight from Nashville to that point and deliver to the truck at that price.

Q. Now, when the distribution arrangement with T. L. Herbert was discontinued in—was it 1930?

A. 1930; yes, sir.

Q. Did Hermitage Company change the method of determining its truck prices?

A. No, sir.

Q. That is, after the deduction.

A. That is correct; after we deduct the freight.

Q. Now, when this distribution arrangement was discontinued, did the Hermitage Company change its practice with respect to quoting f.o.b. mill on certain occasions?

A. No, sir.

Q. And at that time did the Hermitage Company
36125 change its practice with respect to being a price follower?

A. No, sir.

Q. Now, just briefly, what do you mean when you say your company is a price follower?

A. Well, of course, being a small company, and only covering a small area, why, we meet competition as we find it. In other words, we either meet competition as we find it or we withdraw from the market if the competition is too low for us.

Q. Do you have any understanding or any arrangement with any other Respondent that Hermitage would be a price follower?

A. No, sir.

Q. Who determines the price policy of the Hermitage Portland Cement Company?

A. I do, of course, in connection with Mr. M. C. Monday, our president. I talk it over with him.

Q. And how long have you participated in the determination of the Hermitage price policies?

A. Ever since Hermitage has been in existence.

Q. During that period has your best judgment as to the method you would follow been restricted or limited in any way?

A. No, sir.

Q. What is your method of determining what the competition is that you have to meet?

A. Well, of course, those are the prices, the lowest prices that our salesmen find at delivered points.

36126 Mr. Werle: Now, if Your Honor please, I have in my hand some samples of the way this company learns of prices in the field, and from Your Honor's past rulings I have reason to believe that we will not be permitted to offer these in evidence.

I would like to have them given some identifying mark, if I may, so that I will have preserved our record with respect to them. As to them, so that there will be no intimation that I am trying to prolong this proceeding, I have no reason for not having them marked during the noon recess, if that is agreeable.

Trial Examiner Norwood: Yes.

Mr. Werle: But I do want them to have numbers.

Trial Examiner Norwood: Yes; they shall have numbers.

By Mr. Werle:

Q. And as to that, Mr. McGovern, I believe you have seen these recently?

A. Yes, sir.

Q. Can you state that they are quotations of competitor companies which your company has picked up in the field by its salesmen during the periods covered?

A. They are sent to us by dealers.

Q. These are typical?

A. Yes, sir.

36127 (The documents were marked for identification "Respondents' Exhibits 2650-A to 2650-A-17.")

By Mr. Werle:

Q. Now, Mr. McGovern, in determining what price your company will quote at a given destination, what is the first thing you do?

A. Well, the first thing we do is we find what is the lowest price quoted at that point.

Q. And do you keep any record of these lowest prices that you have found from time to time?

A. Yes, sir; we keep a visible card index.

Q. And the prices shown on this visible card index are obtained from the field, as you have already described?

A. Yes, sir.

36135 Now, does your company have any practice as to openly announcing its prices to your customers?

36136 A. We send out quotations; yes, sir; after there is a change in price.

Q. Is that the only occasion that you send out quotations?

A. I don't remember where we have ever sent them out. We might have when we first went in business, but I don't remember sending them out unless there was a change.

Q. How long have you been doing that?

A. Since we started in business.

Q. What has been your practice with respect to adhering to your published quoted prices? Do you adhere to them, or you vary from them?

A. We have varied from them.

Q. Can you tell me under what circumstances you have varied from them?

A. Well, we have varied from them from time to time when we had reason in our own mind and to believe that

the prices, the published prices from some other company were not being maintained, and to meet that competition we have varied from our prices.

Q. Now, is that something unusual or is that a frequent occurrence?

A. I would say it is more or less frequent. I would not say it is unusual.

Q. Over what period of time has that been true?

A. I think since we have been in operation.

36137 Q. Now, you say that you will vary your published price in an attempt to meet a competitive situation. Do you go beyond the competitive situation at times, or do you always try to stop to meet it?

A. I am satisfied at times we have gone beyond his prices. Of course, we could only use our best judgment in making our prices.

Q. Are such variations as you have made limited to any particular type of customer, or kinds of customer?

A. The majority of them have been to contractors on highway construction.

Q. When you varied from your published prices, as you described it, has that been done openly, publicly?

A. No, sir. We try to keep it as quiet as possible.

Q. Will you explain why that is?

A. Well, the reason we do that is because if it becomes generally known it might have a tendency to lower the prices throughout the entire area. We do not want that to happen, if we can keep it from them.

Q. Have you observed in your experience that that has occurred?

A. Yes, sir.

Q. Have you been active at all in traveling around your sales territory?

A. Oh, yes; I get around the sales territory quite often.

36138 Q. You mentioned that you found competitors varying from their published prices. How have you found that?

A. Well, we find out mainly from some customer we have ben selling over a period of a good many years, and a job comes up and we are unable to sell him, and we dig into it a little closer, and we usually find out the reason he does not buy from us is because he was able to buy from our competitor at a cheaper price.

Q. With respect to public bids, bids of public bodies that are going to be opened, what has been your practice with respect to deviating from your commercial and published prices?

A. I do not remember of any occasion where on public bids we deviated from our published prices.

Q. What has been the reason for that?

A. Well, as I say, we naturally would not want the entire territory to be affected by bidding a price less than our published prices, to a certain point.

Q. Now, when you receive word from your salesmen or customers as to an advance in price, let us say at a particular destination, will you explain what you do before you determine whether or not you meet that particular advance at that point?

A. Well, what we usually do, of course, is to have our salesmen check through a good many points throughout that area to se if that change has been constant; and if it has, why, affecting that territory, we send out quotations to meet those prices.

36139 Q. In the case of declining prices that you have found at a particular destination, do you do the same thing?

A. Yes, sir.

Q. Now, in meeting changes in price at destination, what has been your company's practice as to the date upon which you make your new prices effective?

A. Why, if it is a decline, why, we make it effective immediately, and go back; and any shipments we have made to dealers, or the Government, within a period of five days, we allow them the benefit of the decline. If they are advances, why, we usually follow the advances given our dealers, giving as much time as we can, usually four to five days, to protect himself on any commitments that he has had.

Q. Now, as to this making the decline in price retroactive, how long—for five days, I think you said?

A. Yes.

Q. How long has that been the practice?

A. It seems to me that that was established along about the Code period, or just a little prior to the Code period, we found some of our competitors were allowing that, and naturally we had to meet the condition.

36140 The witness identified Resp. Exs. 2652-A, B, 2653, 2654-A, B, C, 2655-A, B as correspondence which

Hermitage received and sent in the regular course of its business on the dates indicated. He dictated these letters. One is a letter from Fischer Lime and Cement Company in Memphis, dated May 6, and his answer dated May 8; the second one is a letter to the Manchester Supply Company, Manchester, Tenn., dated May 14, 1929. They all are to and from customers of Hermitage. They relate to Hermitage's policy concerning decline of prices prior to
36141 the NRA period. The handwriting on Resp. Ex. 2654-B is a notation from the dealer that sent it to him. Resp. Ex. 2655-A is his letter in response to that notation.

Mr. Werle: I offer them in evidence (handing the documents to Mr. Paulson).

Mr. Paulson: We object to these documents because the witness is here and can tell us about his company's policies, and while there may be some grounds or rights for Respondents to corroborate every bit of witnesses' testimony, there must be some limitation to those grounds, too, and that is all that this would do. I did not know what the limitations are.

36142 Mr. Paulson: Yes; and furthermore these contain self-serving statements, and there are some letters there by dealers, of course a third party, so the shortest way here would be to ask the witness those questions.

Trial Examiner Norwood: The objection is sustained.

36144 Trial Examiner Norwood: And we avoid the situation of having factual statements put in there that have to be carefully read and studied, and so forth.

The objection is sustained.

Trial Examiner Norwood: In the first place, paper-
36145 writing of a witness who is on the stand and can give us the contents of it are strictly not admissible.

Trial Examiner Norwood: And those paperwritings involve the reception of letters from third parties who are not here to be examined. Those are two of the reasons. There is another reason there why I sustained the objection, and that is that it is stated and not denied that they are factual statements in there, and I think that it would be much more satisfactory for this witness to tell us about his policy. It is merely offered there to show his policy as to this time on a matter that we have received a great deal of information on.

Trial Examiner Norwood: I have explained myself as clearly as necessary, and the ruling is just this: The objection is sustained.

36146 By Mr. Werle:

Q. I think you said that you had the policy of allowing a certain number of days for a price advance, Mr. McGovern. How long have you had that policy practice?

A. It seems to me since about the Code, if I remember correctly.

Q. With respect to price advances, are you able to state from your experience how soon you usually receive orders under the new price after you have advanced your price?

36149 A. Oh, I would say from sixty to ninety days.

36150 Q. And are you able to estimate at all as to the length of time it takes you to realize, fully realize, the increased prices?

A. Why I would say it would probably take four to five months before you fully realized them.

Q. Will you explain why that is?

A. Well, when there is an advance, of course the contracts you have on your books you have to ship at the old price, and every dealer covers up for everything he can, puts everything in the warehouse and has to get rid of that before we are able to sell him any at the new price.

Q. Now, do you have in your specific job contracts a clause giving the benefit of any decline to the person having that contract?

A. Yes, sir.

Q. Why do you have that clause, Mr. McGovern?

A. Well, I imagine that the reason is because if we do not give him the benefit of it he can buy from our competitor at the market price, which is lower at that time than our contract price if there is a decline.

36152 The witness identified Resp. Ex. 2656-A to Z-159 and Resp. Ex. 2657-A to Z-103 as freight rate books which Hermitage used in 1924, when it started mak-

36153 ing shipments from the Hermitage plant. He prepared most of the books in 1923. The source of the information in them was railroad tariffs. These books were used in connection with the sale of Hermitage cement from 1924 until it started receiving freight rate books from the Institute.

The headings across the top on Resp. Ex. 2656-B are points from which shipments were made both from competitors' mills and from Hermitage's own mill location. The column on the left hand side is the destination. The states of Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, Kentucky, South Carolina and Tennessee covered in the books.

36154 The pencil figures and ink figures written in on the various pages were changes in the freight rates. The books were kept up to date by the witness part of the time and by his assistant part of the time.

Examination by Trial Examiner Norwood.

When Hermitage started using these books the Institute books were not in existence. Hermitage did not use them, but used the Institute books after the Institute books were received.

36156 (RESP. EXS. 2656-A to 2656-Z-159, and 2657-A to 2657-Z-103, were offered and received in evidence.)

Direct Examination by Mr. Werle (Continued)

Q. Mr. McGovern, how long did it take you to compile these two books Mr. Paulson were asking you about?

A. Oh, I imagine about six months.

Q. I understood you to say you had a traffic man at the time that you were using these books?

36157 A. T. L. Herbert & Sons did; yes, sir.

Q. Will you explain what his duties were, what he did?

A. Well, he made the bills of lading, looked after the shipping, that is, Hermitage shipments, in addition to other shipments T. L. Herbert made; they were also in the sand and gravel and brick business.

Q. Did you participate in keeping the books up to date?

A. Yes, sir.

Q. And did your traffic man also do that?

A. Yes, sir.

Q. Do the pencil and ink changes and corrections in here represent the changes and corrections keeping these books up to date, in other words?

A. Yes, sir.

Q. In that period?

A. Yes, sir.

Q. Now, then, I understood you to say that you have used The Cement Institute freight rate books since the Institute has begun to furnish them for your area?

A. Yes, sir.

Q. Have you made any different use of the Institute rate books than the use you made of these two rate books which we marked in evidence Respondents' Exhibit 2656 and Respondents' Exhibit 2657?

36158 A. I would say the only difference was in probably the billing out shipments when we had those books and billing out shipments now.

Q. As to that, do you have any occasion to use freight rates in connection with shipping?

A. No, sir.

Q. In connection with billing, do you?

A. No, sir; we put our rates, if my assistant thinks of it, the rates in the bill of lading. If he leaves it off, the railroad puts it on. It is not necessary.

The witness identified Resp. Ex. 2658 as a duplicate of an actual Hermitage invoice of a car shipped to a Dyersburg, Tenn., dealer; Resp. Ex. 2659 as the actual bill
36159 of lading on that shipment; Resp. Ex. 2666 is the paid freight bill that the dealer sent back to Hermitage after he paid the freight on that car. That is the form of invoice used by Hermitage for at least ten years.

36162 (RESP. EXS. 2658, 2659, and 2660, were offered and received in evidence.)

Direct Examination (Continued) by Mr. Werle.

Q. Mr. McGovern, I do not know whether this is clear or not: What is the practice in your company as to putting the freight on the bill of lading?

A. As I say, if our traffic manager thinks of the rate, he puts it on there, just to help the railroad. If he does not, he does not put it on there, and I would say that by far the majority of our bills of lading do not carry the freight rate.

Q. With respect to your invoices, have you, during the past 10 years, or perhaps more, shown any freight on the invoices?

A. No, sir.

Q. By the way, in that connection, Mr. McGovern, how do you post your prices on your ledger?

A. The total amount, just like the invoice is.

Q. Then, do I understand that this paid freight bill, such as Respondents' Exhibit 2660, is credited against your customer's account when it comes in? Is that correct?

A. Yes, sir.

36163 Q. By the way, how long have you been doing that?

A. Oh, I would say for at least 10 years. I don't remember just exactly how long.

Q. Have you ever found it necessary to show the freight on the bill of lading that you turned over to the railroad?

A. No, sir.

Q. And then, on Respondents' Exhibit 2660, there is some writing in red pencil, with a check in it and an O. K. Can you tell me what that is?

A. When that freight bill came in our traffic manager checked it to see if it was correct, and it is O. K.'d.

Q. Can you tell me what the traffic manager checks the freight bill with when it comes back?

A. The Institute freight rate books.

Q. Prior to the time that you had the Institute rate books, did you have any different practice in that respect?

A. I don't believe we did. At one time we did deduct the freight from our invoices, and I think it was quite a few years before we got the Institute freight rate books, if I remember correctly.

Q. And so far as you used the Institute rate books in connection with the shipping or billing, are they adequate for this purpose?

A. Yes, sir.

Q. Do you have any occasion to check the accuracy of 36164 the rates in the Institute rate books that you use?

A. We do not check them regularly. If there is any doubt in our minds regarding the rates, we do have the tariffs in our office that we can check.

Q. Have there been occasions, where, as you say, there has been some doubt as to the rate?

A. Yes, I believe in one case we found where there was a mistake in the Institute book. I have forgotten the exact circumstances.

Q. With respect to that, do you happen to recall whether you used the Institute rate or the correct rate?

A. I do not believe that we had occasion to use that rate.

Q. I see.

A. If we had used it, we would have used the correct rate in the tariff.

Trial Examiner Norwood: Do you mean in pricing?

The Witness: Either way—either shipping or pricing. We used the correct rate in the tariff in preference to a rate that we knew was not correct in the Institute freight rate book.

Trial Examiner Norwood: Do you do any pricing which you figure out, yourselves?

The Witness: Yes, sir.

Trial Examiner Norwood: You are not governed by what you find in the field?

36165 The Witness: A lot of times, after you find a certain number in the field, you will find a point in highway jobs, maybe, where it is necessary to do some pricing without a quotation picked up at that point.

By Mr. Werle:

Q. With respect to that, how would you go about that?

A. Just as I say, after you have a certain number of quotations in any area, and figure them back to a common point, you know what that price at that mill is. Consequently, if you have occasion to figure a price at some point, where you do not have a card, you figure that delivered price on the basis of that area.

Q. You say you know what the price at the mill is. How do you know that is the price?

A. You just use your own judgment. Of course, you cannot be positive that that is what it is going to be, from past experience.

Q. Have you had any occasions where you used your judgment, as you expressed it, and have been wrong?

A. Yes, sir.

Q. Can you recall an instance of that?

A. Yes, sir; I remember an instance at Knoxville, Tenn., where, when we figured one on that basis, when there was a price change, we found that the Volunteer Company did not change their price. Of course, we had to meet their price.

36166 Q. Do you recall any other instances?

A. I do not know that there are any others that

I can recall right now. There probably have been some. I am satisfied of that.

Q. Now, has there been any occasion when you have used the rates from the Institute rate book which you thought was in error because you had not been notified by the Institute of the change or of a correction?

A. No, sir.

Q. Do you and your company have any understanding that you are to wait for a correction notice before using any rates which you care to use?

A. No, sir.

Q. Do you have any understanding with any Respondent as to use or non-use of The Cement Institute rate books?

A. No, sir.

Q. Now, when there are changes in freight rates in the area where you are selling, what has been the practice of your company as to whether or not you reflect the changes in freight rates in your prices?

A. Yes, sir; we try to. That is, if we find the delivered prices reflect them, of course, we follow the prices.

Q. Have you found that every time there is an upward or downward revision of freight rates, it has been reflected in the prices that you have found in the field?

36167 A. No, sir; I remember one instance where it was not.

Q. Was that an increase or a decrease?

A. Is was an increase.

Q. In your experience, has there been any decrease in freight rates which was not reflected in the price you found in the field?

A. No, sir.

Q. Has there ever been a time since your company has used the Institute rate books that modifications or changes in the rates were not promptly published by the Institute?

A. Yes, sir; I remember one.

Q. Will you tell me about that?

A. I remember there was a rate published by the Tennessee Central Railroad from Nashville to a little point called Riverside that they put in their local tariff. That never was published in the cement tariff, and the Institute freight books never did show that change.

Q. You say it was never published in the cement tariff?

A. That is right, never published in the Cement rate book.

Q. Do you recall anything about that particular instance, Mr. McGovern? Did you have anything to do with that?

A. Yes, sir.

Q. Will you tell us about that, please?

A. Well, I will tell you, there was a job right there at Nashville, and we told the contractor that if he could
36168 get a cheaper rate—he was figuring on trucking the cement—if he could get a cheaper rate we would reflect that cheaper rate in his price, and the Tennessee Central put that rate in, and they published in their local tariff, so that the rest of the manufacturers would not know what was going on and raise a complaint about a like reduction in their rate, and the Institute never did find it out.

Q. Did you get that business, by the way?

A. Yes, sir.

Q. In your selling area are there any different rates applying for different weights of cars?

A. No, sir. A minimum of 50,000, and that same rate from then on up.

Trial Examiner Norwood: Where that rate was reduced, that way, and the others did not know about that, that put you under them?

The Witness: Yes, sir. That was my intent.

By Mr. Werle:

Q. Now, without having these Cement Institute rate books, Mr. McGovern, what would you do?

A. Why, we would just have to compile our own books like we did before we got them.

Q. From your experience, have you found that the Institute books are more or less convenient than having
36169 to prepare and keep up to date your own rate books?

A. Oh, much more convenient.

Q. Now, I think there is some reference in the record to some change that occurred in your area with respect to prepayment of freight, Mr. McGovern. Have you had any practice with respect to that?

A. Yes, sir; since along about the first part of January we have been prepaying freight.

Q. And prior to that what was your practice?

A. Why, we only prepaid freight to prepaid points.

Q. Can your tell us what were the circumstances which caused you to change your practice?

A. Yes, sir.

Mr. Paulson: Just a minute. Aren't we past the date of the complaint now? I do not know; this is a change in January, 1940?

The Witness: That is right.

Mr. Paulson: I do not know whether we should go into that.

Trial Examiner Norwood: I do not think we should go into that.

Mr. Werle: Well, Your Honor, neither do I if it is consistent on both sides, I grant you that. If we are going to be consistent one way or the other, I would like it very much if we stopped at July, 1937, but we have not
36170 stopped at July, 1937.

36172 Trial Examiner Norwood: I did not know that they had made any point of your not prepaying freight.

Mr. Werle: Well, I think they have made a point.

Trial Examiner Norwood: Then, they have asked many witnesses whether they did repay freight or not, and found some who did and some who did not.

Go ahead. If Counsel is going to connect it with any of this other testimony.

The object is overruled.

By Mr. Werle:

Q. I believe the question was, Mr. McGovern, what the circumstances were under which you changed your practice in that connection.

A. We found an announcement in Nashville sent out by the Signal Mountain Portland Cement Company stating that after, I believe it was, December 28th, that they would prepay freight on their shipments. We adopted the practice along about, oh, I would say the 8th or 10th of January.

Trial Examiner Norwood: Now, that is what year?

The Witness: 1940.

By Mr. Werle:

Q. Will you state the reason why you adopted it?

A. Well, of course, we have to meet favorable conditions that our competitors put out, and that was a help to the

dealer. It saves him putting out his money and
36173 then waiting 15 days to pay the invoice. In other words, he was out that money for 15 days.

Trial Examiner Norwood: Did you allow discount on that freight?

The Witness: The discount is based on a barrel, not on the total amount of the invoice.

Trial Examiner Norwood: Go ahead.

By Mr. Werle:

Q. Mr. McGovern, coming to another subject for the moment, Commission's Exhibit 976-10-T is one portion of the Burns and Clark questionnaire answer of your company and it indicates that you at one time made deliveries to customers' trucks at the mill, and that in February, 1933, that you discontinued trucking. Have you told us as yet whether or not the manner in which you made up your prices in connection with truck deliveries? I do not recall whether you told us that or not.

A. Yes, sir.

Mr. Paulson: Yes, he has.

By Mr. Werle:

Q. Can you tell me from your recollection how long prior to your company's announcement of discontinuing trucking that the competitors of yours in that area had done so?

A. Oh, I think that we trucked probably a year longer than any of the manufacturers in our area.

36174 The witness identified Resp. Ex. 2661 as the announcement Hermitage sent to its trade with respect to trucking in February 1933.

Trial Examiner Norwood: Did you consider that you had a trucking problem down in your area?

The Witness: I do not know exactly what you mean, Judge, by a trucking problem.

Trial Examiner Norwood: You then did not consider it. That is the answer.

Mr. Paulson: No objection.

Trial Examiner Norwood: Received as marked.

(RESP. EX. 2661, was offered and received in evidence.)

By Mr. Werle:

Q. You said, I think, that competitor companies had stopped trucking perhaps a year prior to your company.

A. I would say anyhow a year.

36175 Q. Does that include the Cumberland Portland Cement Company?

A. Yes, sir.

Q. Now, will you tell us briefly what were the circumstances which caused your company to issue this announcement, Respondents' Exhibit 2661?

A. Well, as I testified before, when a truck came to our plant we took his destination price and deducted the freight to our plant, consequently, the farthest point he came from why, the more deduction the freight was. That enabled him to stop it intermediately and sell it, interfering with our dealer trade, and it caused us so much trouble we eventually just quit it. We held on as long as we could.

Q. In connection with the question that the Examiner asked you, was that a problem to you, or wasn't it a problem?

A. Well, yes, it was a problem because it was interfering with our good customers.

Trial Examiner Norwood: Well, he could deceive you. You asked where he came from.

The Witness: Well, we had to watch that terribly close, and we were fooled a lot of times.

By Mr. Werle:

Q. Well, will you explain just how that affected you; I mean, why it was unsatisfactory to your company?

A. Well, we have a good many dealers in the close vicinity of Nashville, and, as I say, when a dealer

36176 came from a far-off point he got his cement cheaper at Nashville; consequently, he could stop it at intermediate points and disrupt our policy at that point with our cement.

Q. I show you Commission's Exhibit 976-10-T, with respect to that subject matter, and ask you if that is substantially what you mean by your answer to the question 10-B-III?

A. Yes, sir: that is exactly it.

Q. Now, did you have any arrangement or any understanding with competitors with respect to this decision of yours on trucking?

A. No, sir.

Q. Was your decision taken as the result of any communication or understanding with them about that?

A. No, sir.

Q. Did you ever put any charge for 15 cents more for cement delivered to trucks at the mill?

A. No, sir.

Q. Did you ever put on any additional charge of that character?

A. No, sir.

Q. Now, during the period that you were permitting customers to come and take delivery on trucks, what was your policy when you found that a customer did take the cement into some other dealer's market or some other dealer's territory?

A. Well, on one or two occasions we notified them if they did it again we would have to discontinue sell-
36177 ing them, and did discontinue selling several of them.

The witness identified Resp. Exs. 2662, 2663 and 2664 as letters written by him to dealers in 1931 and 1932.

Q. And do they represent the attitude that your company took with respect to that subject matter at that time?

A. Yes, sir.

36178 (RESP. EXS. 2662, 2663, and 2664, were offered and received in evidence.)

By Mr. Werle:

Q. Before I get to these other exhibits, Mr. McGovern, did you find, during the time that you were trucking, that truck delivery caused a breakdown of your prices or affected your prices in any way?

A. No, sir; I wouldn't say that.

36179 The witness identified Resp. Exs. 2665 to 2668 as reports from Hermitage salesmen to him in August, 1932, September, 1932, February, 1933 and August, 1937.

Q. Would you tell me whether or not these reports from your salesmen are typical of the reports that you were receiving during that period—

A. Yes, sir.

Q. —with respect to this subject matter?

A. Yes, sir.

Q. As to the reports from your sales force prior to the time that you decided you would notify your trade about discontinuing trucking, did they enter into your decision in any way?

A. The salesmen?

Q. The reports from your salesmen?

A. Yes, sir.

Mr. Werle: I offer these in evidence (handing the documents to Counsel for the Commission).

By Mr. Werle:

Q. Were those reports made currently by salesmen in the regular routine of their business?

36180 A. Yes, sir.

Q. And they have instructions, do they, to that effect?

A. Yes, sir.

36182 (RESP. EXS. 2665, 2666, 2667, and 2668, were offered and received in evidence.)

By Mr. Werle:

Q. With respect to trucking, Mr. McGovern, since this announcement of yours in February, 1933, have you had requests from time to time from customers to take delivery by truck?

A. Yes, sir.

Q. And have you honored such requests, or have you refused, or what has been your practice on that?

A. In the immediate vicinity around Nashville, we have allowed them to truck, and we discontinued

36183 deducting the freight to destinations; so, of course, that made it very unattractive for the dealers in the territory.

The witness identified Resp. Ex. 2669 as shipments that Hermitage delivered to truck from the time it started through 1939 taken from the company's records. Hermitage keeps a daily record of all shipments, that is the number of cars, the number of barrels in those cars, the number of barrels by truck and the total number of barrels that day; and at the end of each month it is totalled up and a check is made with the mill to see that it is accurate. Resp. Ex. 2669 was taken from that record. It was prepared at his request and under his direction, and checked by him.

36184 (RESP. EX. 2669, was offered and received in evidence.)

By Mr. Werle:

Q. Mr. McGovern, this morning some time we were discussing your policy with respect to declines in price. Prior to the Code, what was your policy in that respect?

A. Well, we did not have any definite policy. It just depended on who the customer was and what he wanted us to do; that is, how far he wanted us to go back to allow him the benefit of the decline.

Q. Do you recall any specific instances of the manner in which you applied that policy to different situations as they came up?

A. Yes; I remember three or four different instances.

Q. Are those instances reflected in Respondents' Exhibits, for identification, 2652, through 2655?

A. Yes, sir.

Q. Now, will you tell us about those, and, if necessary, to refresh your recollection, refer to those Respondents' exhibits.

Trial Examiner Norwood: Go ahead.

A. The first, ours, Respondents' Exhibit 2652-A, was a letter from Fischer Lime & Cement Company, who at that time were representing us in Mississippi and
36187 wrote us regarding a car of cement we had shipped to Love Wagon Company at Durant, Miss., and decline had taken place about a day or two after we had made the shipment, and he wanted us to allow them the benefit of the decline, and we refused.

36188 Q. Well, will you continue, Mr. McGovern, with the specific instances that you do recall, and tell us about those, and, of course, it is not proper to read the exhibits, but you may refer to them to refresh your memory.

36189 A. A dealer at Manchester, Tenn., the Manchester Supply Company, wrote me and asked me to allow them the benefit of a decline on a car that had been shipped several days, and I declined to do it. I also told them that if I had known, of course, that there was going to be a decline I would have held the car until the decline took effect and then shipped it.

The Gallatin Coal and Lumber Company, at Gallatin, Tenn., sent me a quotation from the Lehigh Company in which they said that they did not see why I did not notify them of a decline in price. I wrote and told them that they knew it as soon as I did. If I had known it I certainly would not have shipped their car a day or two earlier.

By Mr. Werle:

Q. Well, was that the fact, Mr. McGovern,—had they known it as soon as you did?

A. Yes, sir.

Q. As far as you were able to observe?

A. Yes, sir.

The other one was an incident, the Colonial Supply Company, Louisville, Ky., wrote me regarding a decline in price that Lehigh had put in in the State of Indiana on some bids up there, and wanted to know if we were going to meet that decline, and, if so, that they should be allowed the benefit of the decline on the car we shipped them. I wrote and told them that we did not know that Lehigh of course were going to reduce their price in Indiana,
36190 but although they did reduce them in Indiana, they did not send them out to the trade until a few days later, and, consequently, we could only base our decline on the day that Lehigh sent out their quotations, the effective date.

Q. What was your reason for that?

A. Well, these cars had already been shipped and we could not go back and allow a decline before our competitors allowed a decline in the market where we were shipping.

I believe that covers it.

Q. Mr. McGovern, with respect to those incidents you have just told us about, can you say whether or not those were typical of other situations that occurred?

A. Yes, sir; I would say so, up until the time that we adopted the five-day retroactive.

Q. Do you recall Article XI of the Code of Fair Competition for the Cement Industry, which was approved by the President of the United States November 27, 1933, Mr. McGovern?

A. Fairly well; yes, sir.

Q. I show you Commission's Exhibit 557, and refer you to Article XI. Will you just examine that sufficiently to tell us to what extent the provisions in Article XI represented new practices for your company?

A. They were practically the same that we had been following for a good many years.

36191 Q. And with respect to the practices that you were following immediately prior to the Code, how were they developed? How did your practices come about?

A. Well, of course our practices come about over a period of a good many years, and they have come about as our competitors have changed their policies, more fa-

vorable to our customers, why, we have had, of course, to meet those conditions or forego the business.

Q. I show you Respondents' Exhibit 644, which purports to be an announcement of your company on December 29, 1930. Can you identify that, Mr. McGovern? Do you recognize that?

A. Yes, sir.

Q. And is it correct as stated there, that you did adopt the five-cent dealer service payment plan?

A. Yes, sir.

Q. Prior to adopting that policy, what were your discount terms, do you recall?

36193 A. Our discount terms were 10 cents a barrel, 15 days.

Trial Examiner Norwood: Now, you made an additional charge of 5 cents?

The Witness: No, sir. Under this plan we gave them at the end of the year—we gave them 5 cents back. That was the Lehigh plan.

By Mr. Werle:

Q. Do you recall how long after the Lehigh Company announced this that your company finally adopted it, Mr. McGovern?

A. Oh, it must have been at least three months.

36194 The witness identified Resp. Ex. 2670 to 2674 as letters from dealers, and his answers to them regarding that five-cent policy.

Q. At the time that you were receiving this correspondence, had you adopted the 5-cent dealer payment plan?

A. No, sir.

Q. Does that series of correspondence explain and show what your dealer policy was during this period that other companies had adopted the plan that you had not?

A. Yes, sir.

Q. And does it show how you handled that with your customers?

A. Yes, sir.

Q. And does this correspondence also show to some, or does it represent the attitude of your customers?

A. Yes, sir.

Q. And it was subsequent to this exchange of several letters, and what not, that your company finally decided to adopt the Lehigh plan; is that it?

A. Yes sir.

36196 Trial Examiner Norwood: Wasn't this more favorable to the customer by giving him 5 cents a year?

The Witness: Well, some considered it such, and some considered we were cutting their differential, their mark-up on carload business, and there was quite a difference of opinion regarding it.

Trial Examiner Norwood: And you came to this policy which was contrary to the wishes of your customers?

The Witness: Well, no, sir; I would not say contrary. I say some were very much in favor of it, and others were not, and we had to make a decision as to which way we were going, and it took about, as I remember, at least three months to make that decision.

(RESP. EXS. 2670-A, 2670-B, 2671-A, 2671-B, 2671-C, 2672-A, 2672-B, 2672-C, 2673-A, 2673-B, 2673-C, 2674, were offered and received in evidence.)

36197 By Mr. Werle:

Q. Now, Mr. McGovern, you just mentioned in answering a question of the Examiner something about the dealer splitting his differential, I think, and in your announcement of December 29, 1930, Respondents' Exhibit 644, you make reference to that also. Will you explain what was meant by that, please?

A. Well, we said in our policy that we intended, of course, to protect any differential that the dealer wanted to make between his cost and his price to his customer. In others words, a lot of the dealers got the idea that 5 cents was all they were going to get, and that was the reason for the division of opinion.

Trial Examiner Norwood: What else was it they were to get?

The Witness: I say, Your Honor, a lot of the dealers figured that that was all they would possibly get. In other words, 5 cents a barrel was all the profit they would make, and we tried to explain in our announcement that that was not our intent. In other words, he could get any amount he wanted to over his cost, and in adddition to that make the 5 cents a barrel, too.

Trial Examiner Norwood: You were not going to sell any consumers direct in competition with him; is that right?

The Witness: No, sir; except the ones, the natu-
36198 ral ones we had always sold.

By Mr. Werle:

Q. Mr. McGovern, if I tell you that the record shows that the Lehigh Company first announced its dealer service payment plan on or about November 10, 1930, would that refresh your memory as to the period of time that elapsed before you announced yours?

A. No, I am satisfied that is correct. I was just taking a stab at it, because I didn't know.

Q. In Respondents' Exhibit 644, you refer to dealers splitting the difference, and I would like to ask you what you meant by that sentence that begins, "Some dealers—"?

A. Well, in other words, the dealers have gotten to a point where they were selling cement, especially on highway construction, at practically no mark-up.

Q. And what interest was that to you?

A. Well, the only thing was, there was a whole lot of dealers whose credit was not good, and it put the manufacturers in such a position that they did not know hardly how to handle it. In other words, a contractor that was friendly to you would want to give you the business, and at the same time he would want to put it through a dealer whose standing or responsibility was not very good,
36199 and it put you in a pretty tight spot.

Q. Now, I believe in the immediately succeeding sentence, you mention that "this has caused a very unsettled condition." Will you explain what you had reference to there?

A. Well, I mean it caused a very unsettled condition as regarding mark-up.

Q. Unsettled as between whom?

A. As between the dealers.

Q. I see.

Now, how long did you continue to follow that policy, Mr. McGovern?

A. My recollection is about a month.

Q. When you discontinued it, in what form did your announcement of discontinuance take?

A. I do not believe we sent out a policy. In other words, we just went back the other way, and on the cement that we had shipped under this policy we sent the dealer a

check for his 5 cents, and went back to the old policy
36200 of quoting just one price, with no refund.

Q. What were the factors that caused you to change your policy then?

A. After we adopted this policy, we got so many requests from dealers to discontinue it, that we followed their request and did discontinue.

Q. Do you know whether or not at the time you discontinued, all of your competitors had discontinued?

A. No; I am satisfied they had not.

Q. Then, after you discontinued that policy, what did your discount terms become?

A. Back to just 10 cents a barrel, 15 days cash discount.

Q. Are they the same terms as today?

A. Yes, sir.

Q. Did you at or about the time you discontinued this 5-cent dealer service payment plan issue any announcement to your customers as to the kind of work that
36201 you would sell direct and the kind of work that you would sell to a dealer?

A. My memory is that we did.

Q. At that time?

A. I am not positive whether it was at that time or not. No; I don't believe we did at that time. It was later on that we issued a policy.

Q. Well, how did you govern your practice, then, during that period, without having announced a definite policy on that?

A. We notified our salesmen, and then, as I say, on all the shipments that we had made during that time, we sent them a check and told them that we had discontinued that policy.

Q. During the period between the discontinuance of this dealer plan and the N.R.A. Code, what did you find as to the direct sales? Were they increasing or decreasing?

A. The tendency was to increase.

Q. Then, when Article XI of the Code and the Code went into effect, did you follow the method set forth therein?

A. Yes, sir.

Q. After Article XI was suspended, what did you do with respect to the practices which were set forth there?

A. We followed them practically the same.

Q. Will you tell us what was the consideration which led you to continue to follow that?

A. Well, it was practically what we had been do-
36202 ing. There were no serious deviations, as I remember.

Q. When you continued to follow this practice, was that done as the result of any arrangement or understanding between you and any competitors or any other Respondent?

A. No, sir.

Q. I call your attention to Commission's Exhibit 557, in Article XI, where there is set forth, on page 340, a definition of a dealer. Was that something new in your company?

A. No, sir.

Q. What was the reason for your company having a definition of a dealer; what difference did it make to you?

A. Well, we were, of course, very much interested in a dealer being a legitimate building supply dealer. While our definition of a dealer was one, of course, that stocked cement for re-sale, we did not want a man offering our cement in carload lots, and then not having a supply on hand to supply the retail trade, although our definition of a dealer has been very flexible.

Q. Has that been true since the Code period, as well as before?

A. No.

Q. Flexible or inflexible?

A. Before, as well as after, it has been flexible.
36203 The witness identified Resp. Ex. 2675 as a letter he wrote and Resp. Ex. 2676 as a letter which he received.

Q. Will you tell me whether or not, after looking at that, it represents the typical manner in which your company goes about selecting its dealers?

A. Yes, sir; it does.
36204 (RESP. EXS. 2675 and 2676 were offered and received in evidence.)

By Mr. Werle:

Q. With respect to the third paragraph in Respondents' Exhibit 2675, Mr. McGovern, comparing that with a definition of a dealer which you say your company substantially followed, are those items set forth in that paragraph the same as the items in your definition of a dealer?

A. Practically so; yes, sir.

Q. What has been your experience, Mr. McGovern, as to whether or not your competitors—some of them or all of them—sell to concerns which your company does not sell as a dealer?

A. It does not affect us.

Q. Well, have you found that your competitors do or do not?

A. Sometimes they do, but still some of them do not.

Trial Examiner Norwood: But in that exhibit there, as I recall it, having read it hastily, the only qualification is that they stock cement?

The Witness: For re-sale.

36205 Trial Examiner Norwood: Do you usually apply only that single qualification?

The Witness: Well, it depended, Judge, on just where the dealer was located. Now, in some small towns, the only building supply dealer will probably be a cement dealer, and the reason I have not asked our salesmen to check up on this fellow is that it is away out of the territory that he would normally travel.

Trial Examiner Norwood: Did you ever require them to belong to any dealer's organization?

The Witness: Absolutely not; no, sir.

The witness identified Resp. Ex. 2677 as a letter written by him in July 1937 to Hermitage's Mississippi salesman.

Q. Can you tell us what brought about your letter to Mr. Caughman?

A. He sent me a report on July 22d, from Coffeyville, Miss.; regarding a dealer down there that some other manufacturers were recognizing. We wrote and ex-

36206 plained our position on the matter.

Q. And does this represent the manner in which you, and the extent to which you are governed by what your competitors do about selling certain people as a dealer?

A. Yes.

36207 (RESP. EX. 2677 was offered and received in evidence.)

36208 By Mr. Werle:

Q. Mr. McGovern, I think the Examiner made some reference to this a moment ago; does it make any difference to you in the selection of your dealers whether or not he is a member of some building supply association?

A. No, sir.

Q. Has your company ever refused to sell a dealer be-

cause he was not a member of some building dealers' association?

A. No, sir.

Q. Have you or have you not been free to exercise your individual judgment in the matter of selling to a dealer, or not selling to him?

A. We have been free.

Q. Can you tell us approximately how many dealers your company has?

A. Oh, I would say approximately four to five hundred.

Q. And can you tell us approximately the per-
36209 centage of your sales annually which have been made to dealers during the past 10 years,—could you strike an average for us on that?

A. Oh, I would say it has been approximately 75 percent; in that neighborhood.

Q. And what proportion of the orders you get, Mr. McGovern, are in the nature of repeat orders?

A. Oh, I would say by far the majority.

Q. Will you explain so that we will have the record clear what you understand me to refer to when I say "repeat orders"?

A. You mean dealers that constantly buy from us from day to day.

Q. Yes.

Mr. McGovern, I show you now copies of Commission's Exhibits 547-A and B, and ask you whether you recall that correspondence.

A. Yes, sir; I remember this.

Q. Can you tell me whether or not Lensing Brothers are or are not a dealer of your company, or were not a dealer of your company at that time?

A. Yes, sir; and we are doing business with them today.

Q. In that letter did you mean to convey to Mr. Lensing that you agreed with him that the manufacturers should confine their sales to dealers entirely?

A. No, sir.

Q. Now, with respect to your statement about the
36210 discontinuance of trucking by the southern mills which appears in paragraph third, you did not mean to indicate, or did you mean to indicate in that that the trucking had been stopped by all of them at or about the same time?

A. No, sir.

Q. I would like to call your attention, Mr. McGovern, to Commission's Exhibit 547-F and 547-G, which purport to be correspondence between you and a Mr. W. W. Mil-
36211 ling. Do you recall that correspondence?

A. Yes, sir.

Q. You have a reference in your letter to stating that you would be willing to cooperate with him. Will you explain in what way you cooperated with Alabama dealers on the job referred to there, if you did?

A. Well, I told him on any quotations that we made we would be glad to protect the mark-up to the contractor that he was asking for. However, I do not think we made any quotations on this job.

Q. Was Mr. Milling one of your dealers, Mr. McGovern?

A. As I remember, we did some business with Mr. Milling a good many years ago.

Q. Now, there is a reference in Mr. Milling's letter to the dealer's model mark-up of 15 cents. Will you explain that, please?

A. That was a 15-cent mark-up over their cost to the contractor on this job he speaks of.

Q. Well, how did you determine that 15 cents?

A. He determined it; I did not.

Q. I see.

Now, what is the practice of your company with respect to your dealers' mark-up,—what do you do about that?

A. Well, on any quotations that we make direct, acting for the dealers, agent for the dealer, why, we quote
36212 any mark-up that he asks us to.

Q. Then do I understand correctly from this correspondence,—and if this is not correct, you correct me,—that he had asked you to observe the 15 cents mark-up when you were quoting them, and you stated that you would; is that correct?

A. That is correct.

Q. And you say that has been your regular practice?

A. Yes, sir.

Q. In doing that, have you done that, or have you followed that practice in co-operation with other cement manufacturers?

A. No, sir.

Q. Do you have any understanding or arrangement or agreement with respect to that?

A. No, sir.

Q. Is the same true with respect to dealer associations?

A. That is true; yes, sir.

Trial Examiner Norwood: Well, that is this cooperation referred to protecting your dealer on this mark-up; is that the idea?

The Witness: Yes, sir.

By Mr. Werle:

Q. Now, I believe there is a reference in Commission's Exhibit 547-G, which is Mr. Milling's letter, a reference to cooperation given by you and all other cement manufacturers. Did you in this instance cooperate with any other cement manufacturers on this matter?

36213 A. No, sir.

Trial Examiner Norwood: Did you know they were cooperating with the dealers in this particular?

The Witness: No, sir. Judge, that Mobile, Ala., is just south of Birmingham, where there is about five or six mills, and our chance to sell that was about one in a thousand.

By Mr. Werle:

Q. Well, with respect to the subject matter of this letter, did you know beforehand, or know in advance, what the other manufacturers were going to do, or whether or not they were going to observe Mr. Milling's prices, or not?

A. I had no idea.

Q. With respect to the particular job that he refers to here, the Mobile County Customhouse job, did you change your practice or policy in any respect in connection with that job?

A. No, sir. Didn't sell it, either.

Q. Let me refer you, Mr. McGovern, first, to Commission's Exhibits 547-II. Do you recall having re-

36214 ceived or having written that letter?

A. Yes, sir.

Q. Can you recall how long prior to the date of that letter you had received the first communication from Mr. Klarer, of the Kentucky Retail Lumber Dealers' Association?

A. As I remember, it had only been a very short time, I would say within a month.

Q. I show you Respondents' Exhibit 2678, for identification, and ask you whether you can refresh your recol-

lection from that document and tell us the first occasion that you heard from this Kentucky Retail Lumber Dealers' Association.

A. Yes, sir. This is November, 1936.

Q. Now, in Commission's Exhibit 547-II, you refer to "our policy." Will you tell us what the policy of your company was that is referred to?

A. The policy of selling one dealer in another dealer's territory.

Q. Well, what is your policy with respect to that?

A. Our policy is to restrict our sales to a dealer's town and his trading area.

Q. How long have you had such a policy as that?

A. I do not remember the time when we did not.

Q. Was that policy adopted because of complaints of dealer associations or through cooperation with any dealer associations?

36215 A. No, sir.

Q. Was it adopted because of, by the influence of any cooperative action with any other cement manufacturers, or with any other Respondent?

A. No, sir.

Q. Did the Kentucky Retail Lumber Dealers' Association ever cause you to change any policy with respect to that your company had?

A. No, sir.

Q. Will you explain what your reason was, Mr. McGovern, for responding to communications from an association of that character?

A. Well, the dealers' associations are made up of dealers in that locality, and some of them are our customers, and we do not like to exactly ignore correspondence we have really from our customers; that is what it amounts to.

Q. Have you at any time cooperated with any dealer association to the extent that you changed or went beyond your own company policy?

A. No, sir.

Q. Will you explain to us what are the reasons for your company policy of not selling the dealer, as you put it, outside his own normal selling area, I think you said?

A. Well, if we sell one dealer right in the face of

another dealer, especially our dealer, why, it causes
36216 him to become dissatisfied, and sooner or later we lose our dealers, which is the backbone of our business.

36223 Q. Mr. McGovern, I show you Commission's Exhibit 547-2-C and 2-D, and I ask you whether you recall having written and received those communications (handing the documents to the witness)?

A. Yes, sir.

Q. Did your company ever refuse to sell Ragland Potter Company, mentioned in there as a dealer?

A. No, sir. We have always sold him, wherever he asked us to.

Q. To what extent have you been influenced by communications of that character from the building and supply dealers' associations?

A. Absolutely none.

Washington, D. C.,
April 10, 1940.

36228 E. W. McGOVERN thereupon resumed the stand and testified further as follows:

Direct Examination by Mr. Werle (Continued).

Q. Mr. McGovern, I show you Commission's Exhibits 547-2-A and 547-2-b. Will you please look at those and state whether or not you recall that correspondence (handing documents to the witness)?

A. Yes, sir.

Q. Would you look at Respondents' Exhibits 2694 and 2695, for identification, which also bear identification numbers Commission's 547-2-B and 547-2-H, and state whether or not those letters relate to this same incident.

36229 A. Yes, sir.

Q. That is, the incident referred to in Commission's Exhibits 547-2-A and 547-2-B?

A. Yes, sir.

Q. Did you write Respondents' Exhibit 2695, for identification?

A. Yes, sir.

Q. And you received Respondents' Exhibit 2694, for identification?

A. Yes, sir.

36230 (RESP. EXS. 2694 and 2695, were offered and received in evidence.)

By Mr. Werle:

Q. Mr. McGovern, prior to having received this letter from Mr. Klarer, which is Commission's Exhibit 542-2-B, did you have any policy with respect to selling a dealer who did not stock cement for re-sale?

A. Yes, sir.

Q. And had you had that policy for some considerable period prior to that?

A. Years and years; yes, sir.

Q. Was that policy influenced in any way by this correspondence to which we have just been referring?

A. No, sir.

Q. Was that policy adopted or maintained as the result of any cooperative activity with any other manufacturer?

A. No, sir.

36231 Q. Or with any dealer association?

A. No, sir.

Q. Who is Mr. E. C. Eggert?

A. He is our Kentucky representative, or was at that time.

Q. What was the purpose of that notation to him on the top of Commission's Exhibit 547-2-A?

A. Well, I wanted to refresh his memory on the policy that we had, and I wanted him to check up and make certain whether Mr. Wickersham was a building and supply dealer, under our definition.

Q. Do you know whether you ever stopped selling Wickersham or whether you ever refused to sell him subsequent to this?

A. No, sir; we never refused to sell him.

Q. I show you Commission's Exhibits 547-Y and 547-Z, will you examine those and tell me whether or not they relate to the same policy which was referred to in Commission's Exhibits 547-2-A and 2-B?

A. Yes, sir; they do.

Q. Now, on Commission's Exhibit 547-Y, there is a note at the top to Mr. Eggert. Is that the same Mr. Eggert, salesman of your company?

A. Yes, sir.

Q. And what were you referring to when you said that, "Didn't want some other company to come into that destination and sell direct"?

36232 A. Well, I mean that we did not want anybody to come into our territory and sell to someone who was not a building supply dealer.

Q. Had anything like that occurred in the past?

A. No, not that I recollect.

Q. Did you have any arrangement with any other manufacturers or with any Respondent as to who you would sell as a dealer and who you would not?

A. No, sir.

Q. Did you stop selling Mr. Williams, that is referred to in that exhibit?

A. No, sir; we are selling him today.

Q. Did you ever refuse an order from him?

A. No, sir.

Q. Do you recall whether you found on the occasion referred to in Commission's Exhibits 547-Y and Z, whether or not he was stocking cement?

A. He was; yes, sir.

Q. I now show you Commission's Exhibits 547-M, T, U, and V, and ask you to examine that and tell us whether or not you recall that correspondence.

36233 A. Yes, sir.

Q. Do you recall whether or not your company was using a stamp on its bills of lading with respect to reconsignment in transit prior to that correspondence?

A. Yes, sir.

Q. You were or were not?

A. We were.

Q. And do you recall for how long?

A. I would say for six or eight months, probably.

Q. Do you recall how you happened to start using such a stamp on your bill of lading?

A. Yes, sir. We bought a car of white cement from the Medusa Portland Cement Company, and when the bill of lading came in we noticed that stamp was on there. We thought it was a pretty good idea so we had one made and began using it.

Q. Mr. McGovern, I show you Respondents' Exhibit 2696, for identification, and ask you to tell us what that is.

A. That is the bill of lading from the Medusa Portland Cement Company, dated September 25, 1935.

Q. Is that the one to which you had reference a moment ago.

36234 Yes, sir.

Q. Now, will you look at Respondents' Exhibit 2697, for identification, and tell us whether or not that is a bill of lading of your company?

A. Yes, sir; it is.

Q. Can you tell us whether or not that is the first time that your company used this stamp?

A. Yes, sir.

Mr. MacIntyre: What is the date of that?

The Witness: October 2, 1935.

36236 (RESP. EXS. 2697 and 2696 were offered and received in evidence.)

Trial Examiner Norwood: For that reason I have 36237 received them.

You did not testify that that was the beginning of your policy in regard to diversion; did you?

The Witness: Nor, sir; our policy had always been against diversion.

By Mr. Werle:

Q. When you say "always," how long do you mean, Mr. McGovern?

A. Ever since I have been in the business.

Q. And how far back does that go?

A. 1916.

Q. Was that stamp which appears on Respondents' Exhibit 2697 adopted by your company as the result of or through the influence of any agreement or understanding or arrangement with any other Respondent?

A. No, sir.

Q. Was it adopted as the result of any influence of any dealer association?

A. No, sir.

36240 Q. Mr. McGovern, in several of these letters of yours to the Kentucky Retail Lumber Dealers Association you state that you were glad to cooperate with them in every way possible, or words to that effect. Can you explain to us what was your purpose in offering that cooperation?

A. Yes, sir. As I say, the Association was composed of building supply dealers, some of them we were doing busi-

ness with and some of them we were anxious to do business with, and we wanted, naturally, to have as far as possible, their good will.

Q. Did you ever change any policy or practice of your company by reason of the overtures of this dealer
36241 association in Kentucky, or any other dealer association?

A. No, sir.

Q. I want to call your attention to Commission's Exhibit 547-L, which purports to be a telegram from you to Mr. Jaeger, and marked Marquette Cement Manufacturing Company in February, 1933. Do you recall that telegram?

A. Yes, sir.

Q. What did that refer to?

A. There was a job coming up in Nashville on which Mr. Jaeger, of the Marquette Cement Manufacturing Company, thought he would probably be asked quotations on, and he asked me to advise him what the dealer differential would be on that job, and that is the reason I wired him "Ten cents up."

Q. Does that mean your discount or differential to the dealer?

A. No, sir; that means the dealer's price to the consumer.

Q. Did your company have any dealer differential as of that date?

A. No, sir.

Trial Examiner Norwood: That meant if they asked you to quote direct, that you would quote anything 10 cents above the prices to the dealer?

The Witness: That is right; yes, sir.

By Mr. Werle:

Q. Well, do you recall that job, or the business that that referred to?

36242 A. No, sir; not now.

Q. Do you recall whether or not it was work upon which you were going to quote direct?

A. Well, the chances are that we would not quote direct, being located right in Nashville. In other words, we would refer any inquiries we had to the dealers in Nashville, but if we did make a quotation, of course, for the dealers, acting as dealers' agent, it would be 10 cents up.

Q. Now, in response to the Examiner's question, is this what you call selling direct in a case of this character?

A. No, sir.

Q. Will you just explain a little more fully as to how that request works out?

A. Well, at any time that we act as agent for the dealer and quote a price to a contractor, we quote whatever he tells us to above his cost.

Q. I see. How long has that been a practice of your company?

A. Ever since we have been in operation.

Q. Can you explain why you do that?

A. Well, it is business—

Trial Examiner Norwood: I think he has explained that clearly.

Mr. Werle: If that is satisfactory, Your Honor; I was just trying to clear that up.

By Mr. Werle:

36243 Q. Do you recall any other occasion when you sent information of that character to Mr. Jaeger?

A. No, sir.

Q. I now show you Commission's Exhibit 547-K, which purports to be a copy of a letter from you to Mr. Jaeger, in August 1933. Will you tell us what you meant by the second paragraph in that letter, referring to information which you might send to him (handing the document to the witness)?

A. I meant any credit information or any information regarding dealer mark-ups in that area.

Q. Do you recall whether you ever sent him such information?

A. We have sent him some credit information, but that was all. That is, I have sent his credit man, not him direct, but his company.

Q. Now, let me show you Respondents' Exhibit 547-I, which purports to be another copy of a letter from you to Mr. Jaeger, in August, 1933. Will you tell me on whose behalf that letter was written (handing the document to the witness)?

A. On behalf of the Nashville dealers.

Mr. MacIntyre: Is this a letter from the witness?

Mr. Werle: Yes.

The Witness: Yes, sir.

By Mr. Werle:

Q. Will you explain that answer a little further, Mr. McGovern.

36244 A. Well, the dealers in Nashville were trying to get more mark-up on the cement than they had done in the past, and they were asking the manufacturers in any direct quotations made to protect that differential, and one of the dealers asked me if I would write to Marquette and ask them if they would protect that differential, and at his request I wrote the letter.

A. And that is the letter that we have just been talking about, Commission's Exhibit 547-I?

A. Yes, sir.

Trial Examiner Norwood: Was Mr. Jaeger the sales manager of the Marquette Company?

The Witness: Yes, sir. He is now.

By Mr. Werle:

Q. Now, I show you Commission's Exhibit 547-H, and ask you whether you received any further response from Mr. Jaeger to your letter, which is Commission's Exhibit 547-K, other than this one marked "H" (handing the document to the witness)?

A. No, sir.

Q. Have you had any understandings or agreements with Mr. Jaeger, or anyone else, for that matter, with respect to the practices of your company in the area where you are selling cement?

A. No, sir.

Mr. Werle: Will you mark this, please.

36245 The witness identified Resp. Ex. 2698 as the announced policy Hermitage mailed its customers on February 22, 1935. It might have been mailed on the next day, but it was mailed within a day or two of that date; at or about that date.

Q. Do you recall the circumstances that caused you to issue this announcement of policy?

A. Well, other companies had issued policy announcements, and quite a few of the dealers asked us what our policy was going to be regarding sales, and for that reason we got out this announcement.

Q. Did you issue this as the result of any arrangement with other competitive companies?

A. No, sir.

36246 Q. Do you recall the announcement of which company was received in the field first?

A. We got two or three of them along about the same time. My memory is it was Lehigh.

Q. Did you have any knowledge in advance that Lehigh or any other company was going to issue such announcements?

A. No, sir.

(RESP. EX. 2698 was offered and received in evidence.)

By Mr. Werle:

Q. I show you, Mr. McGovern, Commission's Exhibit 813-BB, and ask you whether you identify that as an announcement of your company (handing the document to the witness)?

A. Yes, sir.

Q. Will you tell us the circumstances under which you issued that announcement, Mr. McGovern?

A. After there was a good bit of Government purchases through the W.P.A., some of the other companies issued a policy regarding how they would sell this type of work. Of course, then, naturally, our dealers wanted to 36247 know how we were going to handle it, and that was the reason for this policy, which was more or less like the other, with the exception of this type of work.

Q. I believe the record shows that the earliest announcements by other companies in your area of the same general character to this were in April, 1935, and this is dated in May, 1935. Can you explain the reason why you waited this considerable period of time?

A. Well, after we picked up these other announcements in the field, our first inclination was not to issue a policy, but we had quite a good many requests wanting to know what our policy was going to be; so that was the reason for issuing that one.

Q. Would you say that up until you issued this announcement effective May 6, 1935, that you were following your policy, which is Respondents' Exhibit No. 2698?

A. Yes, sir.

Mr. Werle: Will you mark these exhibits, please, as Respondents' Exhibits, for identification.

(The documents were marked for identification "Respondents' Exhibits 2699-A, 2699-B, 2700-A, and 2700-B.")

The witness identified Resp. Ex. 2699-A and B as the first form for specific work sales contracts that the Hermitage Portland Cement Company made up, sometime in 1923. He made it up, and Hermitage used it until sometime after the Code was out. His recollection is that this was sometime in 1936; he further identified Resp. Ex. 2700

A, B, as the present form of specific work contract that Hermitage uses.

36248 Trial Examiner Norwood: Have you used that since the discontinuance of the other one?

The Witness: Yes, sir.

Mr. Werle: We offer both of those in evidence, Respondents' Exhibit 2699-A, B, and Respondents' Exhibit 2700-A, B (handing the documents to Mr. MacIntyre).

36249 (RESP. EXS. 2699-A, 2699-B, 2700-A and 2700-B were offered and received in evidence.)

Direct Examination by Mr. Werle (Continued)

Q. With respect to Respondents' Exhibit 2699-A, B, Mr. McGovern, was that form adopted by the Hermitage Company after communication with or through the influence of any other cement company?

A. No, sir.

Q. Were the terms and conditions which appear in that form adopted through any arrangement or understanding or agreement with any other cement company?

A. No, sir.

Q. With respect to Respondents' Exhibit 2700-A, B, were the terms and conditions set forth in that form adopted as the result of any understanding or arrangement or agreement with any other cement company, or with any Respondent?

A. No, sir.

Q. Did you also prepare Respondents' Exhibit 2700-A, B?

A. Yes, sir.

Q. Mr. McGovern, I show you Commission's Exhibit 877-B, and ask you if you recall that letter?

A. Yes, sir.

Q. Can you explain to us what you meant by the second paragraph of that letter?

A. We meant that we were meeting all those fil-

36251 ings with the exception of those two points.

Q. And when you say that "which are in error," what did you have reference to there?

A. I meant that they were not the same prices that we had filed for those points.

Q. Do you recall as to your company filing prices with the Trade Practice Committee at the time of that?

A. I am satified we were; yes, sir.

Q. Do you recall for how long a period after the date of that letter that you continued to file prices with the Trade Practice Committee?

A. My recollection is it was only a short time.

Q. I show you Commission's Exhibit No. 981, which purports to be a copy of a letter which you wrote in June of 1935. Will you explain to us what that matter was all about, please?

A. We were explaining to the Trade Practice Committee why it was that we had three different prices at Nashville to the three different railroads.

Q. Well, why did you write to the Institute about that, Mr. McGovern?

36252 A. Well, as I remember it, it was during the time that we were filing prices with the Trade Practice Committee.

Q. And can you explain how it was that you had three different prices, as you put it, to three different railroads?

A. Yes, sir; when we quoted to the L. & N.—

Trial Examiner Norwood: May I see that letter?

(The witness hands the letter to the Trial Examiner.)

A. (Continuing) When we quoted to the L. & N. we had to meet the competition of the Birmingham mills located on the L. & N. at Birmingham. When we quoted the N. C. & St. L. we had to meet the prices of the Penn-Dixie Cement Company at Richard City, Tenn., located on the N. C. & St. L. When we quoted to the Tennessee Central Railroad, there was no cement plants located on their lines so we had to take the cheapest price to any point on their lines and quote them that at Nashville.

By Mr. Werle:

Q. Did you understand at this, or at any other time, for that matter, that The Cement Institute was an organization or a vehicle for interpreting policies and in assisting members in determining what policies they should or should not follow?

A. No, sir.

36253 Q. Mr. McGovern, I show you Commission's Exhibit 547-4-D to 4-I, a document consisting of six pages, and I ask you whether or not you ever saw a paper of that character before (handing the document to the witness)?

A. Yes, sir.

Q. Can you tell us when and where you first saw such a document as that?

A. I first saw this in Nashville, along about the latter part of May. A salesman of the Pennsylvania-Dixie Cement Corporation showed it to me. He asked me if I had seen one. He said they had sent it to him from the office.

Trial Examiner Norwood: In May of what year?

The Witness: 1936.

Mr. Werle: I think I can clear that up, Your Honor, by refreshing the recollection of the witness as to the year.

The Witness: 1935, I guess it was.

By Mr. Werle:

Q. Do you recall, Mr. McGovern, having received a letter from Mr. Monday, which is Commission's Exhibit 547-4-C?

A. Yes, sir.

Q. Under date of July 24, 1935.

A. Yes, sir.

Q. Now, with respect to the date of that letter, does that refresh your recollection?

36254 A. Yes, sir; 1935.

Q. Can you tell us who this Penn-Dixie salesman was?

A. Charley Dixon.

Q. And where did you see Mr. Dixon?

A. As I remember, I saw him at a highway letting at a hotel in Nashville.

Q. Can you recall how you happened to come to the subject matter of this paper?

A. As I remember, he asked me if I had seen it, and I told him no.

Q. And did he let you see it?

A. Yes, sir.

Q. After he let you see it, then what happened?

A. Well, I looked it over,—not very carefully,—but I looked it over, and it struck me as being a pretty good illustration of our policy, and I asked Mr. Baker if he would give me one of them.

Q. Who is Mr. Baker?

A. He is the sales manager for the Penn-Dixie Cement Corporation at Chattanooga.

Q. Do you recall what the occasion was when you asked Mr. Baker if he had a copy of that?

A. My recollection is that I met him there at that letting.

Q. I see.

A. Either that day or the next.

36255 Q. And did Mr. Baker give you a copy?

A. Yes, sir.

Q. Do you remember whether he gave it to you on that same occasion, or whether it was sent to you by him or his office?

A. I don't remember whether he mailed it to me or whether he gave it to me at that time.

Q. What was your reason in asking for a copy of that?

A. Well, it struck me as being a pretty clear statement of the policy that we had in effect, and we had one or two salesmen that had only been with us for a short time, and I thought it would be good to send to them.

Q. I think you said that you recalled having received from Mr. Monday a copy of this letter, which is Commission's Exhibit 547-4-C, dated July 24, 1935.

A. Yes, sir; I did.

Q. Prior to receiving that letter, can you tell me whether or not you had done anything in connection with this document that Mr. Baker had given to you?

A. Yes, sir; I had a stenographer to copy it, and mailed it to our salesmen.

Q. Can you say approximately how long prior to the receipt of this letter from Mr. Monday in July that you had done that?

A. It was along about the first part of June of that year.

Q. And now, when Mr. Baker, of the Penn-Dixie Company, showed you a paper, which you say was like this Commission's Exhibit 547-4-D to 547-4-I, did you

36256 come to any arrangement with him or indicate to him that you were going to follow this document?

A. No, sir.

Q. Did you commit yourself as to that?

A. No, sir.

Q. When Mr. Baker furnished you with a copy of it, did you come to any agreement with him with respect to it?

A. No, sir.

Trial Examiner Norwood: What did you tell him that you wanted with it?

The Witness: I don't think I told him, Judge.

By Mr. Werle:

Q. And have you told us what you wanted with it at that time?

A. Yes, sir.

Q. After you obtained a copy of a document similar to that from Mr. Baker, and I believe you said you sent copies of it to your sales force as of that time, did you make any change in either your announced policy of May, 1935, or your own methods of interpreting it?

A. No, sir.

Q. Do you recall whether or not that this document that you got from Mr. Baker expressed any practices different from the practices which your company was then following?

A. No, sir; it did not.

36257 Q. Let me call your attention next to Commission's Exhibit 547-3-W, 3-X, 3-Y, and 3-Z, which purports to be minutes of a meeting of the Sixth District of the Institute in July, 1935. Do you recall having attended that meeting of The Cement Institute?

A. Yes, sir.

Q. Can you tell me whether you had any foreknowledge as to the matters which would be discussed at that Institute meeting?

A. No, sir; I did not.

Q. Had you attended meetings of the Sixth District in the past?

A. Yes; on several occasions.

Q. And can you tell us what were some of the matters that came up at those meetings?

A. About the only thing that stands out in my recollection is the election of a trustee for District 6.

Q. Now, were you in attendance during the entire period of that Institute meeting?

A. Yes, sir.

Q. Now, will you please examine the minutes of that meeting sufficient to be able to state whether or not those minutes accord with your recollection of the matters that were taken up with that meeting of the Institute?

A. Yes, sir; I would say that that covers every-
36258 thing that was taken up at that meeting.

Q. Do you recall any matters other than the matters mentioned in those minutes which occurred during that meeting of District 6 of The Institute?

A. No, sir.

Q. Now, I call your attention again to Commission's Exhibit 547-4-D to 4-I, which is entitled "Method of Marketing Cement," and ask you whether you saw such a paper as that at this meeting of District 6 of the Institute?

A. I did not.

Q. Was there, during the period of that meeting, any discussion of a document such as that, or of the subject matter of that document?

A. No, sir.

Q. Now, let me call your attention to Commission's Exhibit 547-4-J, and ask you whether or not you recall having seen that paper before? Do you recall whether or not you received that from Mr. Monday?

A. Yes, sir. I received that from Mr. Monday.

Q. In connection with Commission's Exhibit 547-4-C?

A. Yes, sir.

Q. Now, during the meeting of District 6 of the Institute, was there any discussion with respect to selling certain kinds of work direct, or through a dealer?

A. No, sir.

36259 Q. Was there at any time any discussion of that subject matter while you were at the Farragut Hotel in Knoxville on July 17, 1935?

A. Yes, sir.

Q. Will you tell us when the discussion occurred and how it occurred?

A. Well, after the Institute meeting adjourned someone brought up the discussion about one of the companies there,—I have forgotten which one,—regarding sale of grading and drainage job that had a chert surface, direct, and there was quite a good bit of discussion regarding it as there were quite a few there under the impression, or under the opinion, rather, that that type of construction should be sold direct. There were others there that did not want to sell that direct, wanted to sell that type through the building supply dealer, and after wrangling back and forth, why, someone sat down and wrote in longhand, similar to that interpretation.

Q. You mean similar to Commission's Exhibit 547-4-J, which I showed you a moment ago?

A. Yes, sir; similar to that; and after he had written it he read it and said, "This is going to be my policy," and, as I remember, one or two more at that meeting said, "We are going to sell that type direct."

Q. Now, just at that point, can you tell me whether or not all of the persons who had been present up to
36260 the time of the adjournment of the Institute meeting participated in this discussion which you have now described?

A. No, sir; I am satisfied quite a few had left; just how many, of course, I do not know.

Q. Can you tell me, Mr. McGovern, whether Commission's Exhibit 547-4-J is an exact copy of this paper that you say was written out in longhand?

A. I would say yes, with the exception of the heading.

Q. By the "heading," you mean the first three lines?

A. Yes, sir.

Q. And you say that someone wrote out something of the character of the A, B, C, D, paragraphs appearing on this Commission's exhibits?

A. Yes, sir.

Q. And that some people expressed approval of it and some expressed disapproval; is that what you said?

A. Some expressed approval and the others either expressed disapproval or said nothing.

Q. Now, with respect to your own company, Mr. McGovern, as to that, can you tell me whether or not you had come to any conclusion about the character of work described in this Commission's Exhibit 547-4-J?

A. Yes, sir.

Q. At any time prior to the going to the meeting?

A. We had.

36261 Q. And it was—which way had your decision been?

A. To sell them direct. We had always been of that opinion.

Q. And will you explain what caused you to come to that decision?

A. Well, in the first place if a job was a concrete pavement, and the structures were awarded with the pavement, why, we would sell it as a pavement, and sell it direct. If there was an asphalt top, gravel top, chert top under that classification, we tried to sell it through a dealer, and after some of the companies sold one or two of them direct we made up our minds we were going to sell them direct as we thought they should be sold.

Q. Had that occurred prior to the occasion when you discussed this at the Farragut Hotel?

A. Yes, sir.

Q. Now, after this discussion, after you got back to Nashville, at that time did you know what all of the other people present in this discussion were going to do about the subject matter of that discussion?

A. No, sir.

Q. How did you find out what they were going to do?

A. The only way we could find out was to wait until they started quoting on some jobs.

Q. And were you able to find out in that fashion?

A. Well, in the beginning we found out one or
36262 two of them had started quoting them direct, and, of course, the rest eventually fell in line.

Q. Well, now, having found that a company has sold work of that character direct, if you had sold it through a dealer why wouldn't you, in the future, continue to sell that through the dealer?

A. Well, where the quotation is made direct, if you sell through the dealer you are out of line on prices because the price direct is the same as the dealer buys it at.

Q. And if you sold through a dealer under those circumstances would you be competitive with the man who had sold direct?

A. No, sir.

Q. Now, I show you Commission's Exhibit 547-4-C, Mr. McGovern, which purports to be a copy of a letter sent to you by Mr. Monday, under date of July 24, 1935. Will you read that letter, please, particularly the second paragraph of it, and state whether or not that correctly states what occurred on this occasion when you were in Knoxville on July 17th?

A. I certainly would not—

Mr. Paulson: We object to that.

Mr. Werle: On what ground?

Trial Examiner Norwood: Read the question.

(Question read.)

Mr. Paulson: He should ask him directly what
36263 occurred there.

Mr. Werle: I have asked him that.

Trial Examiner Norwood: Is that a letter which he had something to do with?

Mr. MacIntyre: No.

Mr. Paulson: He did not write this letter.

Mr. MacIntyre: It was written by the secretary of the meeting.

Trial Examiner Norwood: Do not look at that letter; lay it down. You can ask him about any facts.

Mr. Werle: I have asked him whether the statement here was a correct statement of what occurred at that meeting. I have already asked him what occurred. I am asking him to state whether or not that is a correct statement.

Trial Examiner Norwood: That is a conclusion which you want to bring out from the witness. Just let him state the facts without the letter.

Mr. MacIntyre: What about the witness' answer to the question which is objected to.

Mr. Paulson: I move to strike that out.

Mr. Werle: May I have the answer read?

Trial Examiner Norwood: The objection is sustained to the question and the answer is stricken.

Mr. Werle: May I know the ground? This is a
36264 pretty important matter, and I do not think we ought to have rulings that are too hasty. I would like to know what the ground is, so that I may be in a position to state our position more fully.

Trial Examiner Norwood: The ruling was not too hasty, but I am perfectly willing to tell you the reason why I made it.

Mr. Werle: I am not asking for a conclusion.

Trial Examiner Norwood: The witness had nothing to do with that.

Mr. Werle: It was sent to him.

Trial Examiner Norwood: And he does not purport to quote any statement from it. It is not such a paper as could be used to refresh his memory.

Mr. Werle: He could refresh his memory from it—

Trial Examiner Norwood: He had nothing to do with the paper; you can ask him any factual matter and bring out any facts which contradict that paper.

Mr. Werle: Well, I have already done that.

Trial Examiner Norwood: You see, this is in the nature of suggesting to him just what you want him to deny. He is your client on the stand, and I think, in the interest of fairness, it is not the proper method.

Mr. Werle: Well, will Your Honor read that, if you think that any showing of that paper to the witness
36265 at this time is going to carry any suggestion to him? He received the letter several years ago, and

he is fully aware of the fact that the letter is in this proceeding.

Trial Examiner Norwood: Well, without any reference to the letter, ask him if that is the fact or is not the fact, whether at such a meeting whether that such thing happened or did not happen. I think we have held to that up to this time, and I think it is a very good rule.

Mr. Brick: Your Honor has held it, over objections, so far as it applied to Respondents. I do not think Your Honor held it to any degree at all with regard to offers made by Commission's Counsel.

Trial Examiner Norwood: I do not think you have raised that point.

Mr. Brick: Constantly.

Trial Examiner Norwood: I do not think it came up heretofore.

Mr. Brick: It came up at least a thousand times.

Trial Examiner Norwood: The Commission has not had a client on the stand; so the question could not have come up.

Proceed.

By Mr. Werle:

Q. Mr. McGovern, let me show you Commission's Exhibit 547-4-D to 4-J, inclusive, and let me ask you
36266 as to that series of papers whether or not that series of papers was unanimously concurred in by all members of the Southeastern District of the Institute, and approved at any meeting held in Knoxville on July 17, 1935 (handing papers to witness)?

A. No, sir.

Q. Now, after this occasion in Knoxville, have you told us what happened with respect to the policies and practices of your competitors in that area?

A. Practically all of them at this time were selling direct on that type of structures.

Q. Now, Mr. McGovern, will you please hold in your hand Commission's Exhibit 547-4-D through 547-4-I, and look at the section marked 1(a), with respect to selling United States Government work direct under a specific sales contract, and so forth. Will you tell me for how long your company has had that practice?

A. Ever since we have been in operation.

Q. Since 1924; is that correct?

A. 1924; yes, sir.

Q. Now, would you look at the heading "1(b)," with respect to purchases by federal emergency or unemployment relief agencies, and tell me how long your company has had that particular policy?

A. Well, we started out on that particular policy to sell all emergency relief through dealers, and in
36267 certain sections where other manufacturers have sold them direct, we had fallen in line and quoted classes of that work ourselves.

Q. Confining yourself for the moment to prior to June, 1935, have you had such a policy as that?

A. Yes, sir.

Q. Can you tell us when you began that?

A. Ever since they started purchasing this emergency relief work, which was a few years back.

Q. Mr. McGovern, you have used the expression once or twice that your company fell in line. Will you explain what you mean when you say that?

A. Well, met competition.

Q. Now, will you look at paragraph 1(c), purchases by contractors for work awarded by Government agencies, subheading (1), located entirely within cities, towns, or villages? Can you tell me how long you have been selling that work in the manner described in the second column of that exhibit?

A. Ever since I can remember.

36268 Q. Mr. McGovern, let me give you again Commission's Exhibit 547-4-D through 4-I. Now, will you look at the subheading (c) under "United States Government Work," and the subheading (1) under that, and tell us how long you have been selling that kind of work in the manner described in the second column of that exhibit; that is, (c)(1)?

A. (c)(1), we have been selling that type through the dealer, oh, for years and years.

Q. When you say "years and years"—

A. Well, I would say practically ever since I have been in the business.

Q. Now then, with respect to the subheading (2) under heading (1)(c), will you explain how long you have been selling that kind of work in the manner described under the second column of that exhibit?

A. Years ago that type was sold through the dealer.

However, I would say within the last, oh, six or eight years, probably, we have been selling it direct.

Q. Now, then, will you direct your attention to the heading (2), "State Government Work," and refer to subheading (a) under that, and tell me how long your company has been selling that character of work in the manner described in column 2 of that exhibit?

A. Ever since I have been in the business.

Q. Then, will you look at subparagraph (b) under
36269 heading "State Government Work," and tell me how long you have been selling that character of work in the manner described in column 2 of this exhibit?

A. For years and years; I would say for at least 10, probably longer.

Q. Now, then, will you turn the page, and on page of Commission's Exhibit 547, page 4-E, will you look at paragraph (c) on the top of that page, and state for how long you have been selling that character of work in the manner described in the second column?

A. I would say ever since I have been in the business.

Q. Now, will you look next at subparagraph (d) on the same page and the subheading (1) under that, and tell me how long you have been selling that kind of work in the manner described in column 2 of the exhibit?

A. Ever since I have been in the business.

Q. Now, will you look at subheading (2) under the heading (d), and tell me how long you have been selling that kind of work in the manner described in the second column of that exhibit?

A. Oh, I would say probably eight or ten years. We formerly sold that through a dealer.

Q. Now, with respect to the subheading (e) under "State Government Work," will you tell me for how long your company has been selling that character of work in the manner described in the second column of this
36270 exhibit?

A. Ever since I have been in the business.

Q. Now, will you look at the paragraph (f) under "State Government Work," and tell me how long you have been selling that kind of work in the manner described in column 2 of that exhibit?

A. I would say ever since I have been in the business.

Q. Now, then, will you look at the paragraph 3 at the heading "County Work," as to subheading (a) under that,

will you state how long you have been selling that character of work in the manner described in the second column of this exhibit?

A. For quite a good many years we have sold that type direct. However, there has been very little paving by the counties in that area.

Q. So that as to that paragraph, any of such character of work that you had come under your company's practice, you say you have sold that direct?

A. Yes, sir.

Q. And for how long has that been so?

A. Oh, I would say that is probably true of six or eight years.

Q. Now, with respect to paragraph (b) under "County Work," is the same thing true as to that, the counties have not been doing much work in your area?

A. That is very true, and for years and years that
36271 type has been sold through a dealer. However, I have known of a few deviations where manufacturers have sold counties direct.

Q. Now, with respect to all of these paragraphs that we have already referred to thus far, has there been any one of those thus far from which there may have been, in your experience, some deviation at one time or another?

A. Well, I am satisfied there have been deviations from quite a large percent of them.

Q. Now, then, will you turn the page to page 4-F of Commission's Exhibit 547, and look at the heading (e), and the subheading (1) under that, and explain how long your company has sold that kind of work in the manner described in the second column of this exhibit?

A. Ever since I have been in the business.

Q. Then will you look at subparagraph (2) under that heading (e), and tell us how long you have been selling that kind of work in the manner described in column 2?

A. Well, probably, only for about eight or ten years, I would say.

Q. Now, with respect to subparagraph (d), under the heading "County Work," will you tell me how long you have been selling that character of work in the manner described in the second column of this exhibit?

A. Ever since I have been in the business.

Q. Now, will you look at the next heading, which
36272 is No. 4, "Railroad Work," and as to paragraph (a) and subparagraph (1), will you state whether

or not you have followed that practice, and, if so, for how long; that is, the practice described in the second column on that exhibit?

A. Ever since I have been in the business.

Q. Have you ever had a one-year limit on that kind of work, as described there?

A. No, sir.

Q. Now, with respect to paragraph (2) under "Railroad Work," will you state how long you have been selling that kind of work in the manner described in column 2 on the exhibit?

A. Ever since I have been in the business.

Q. Now, with respect to subparagraph (b), under "Railroad Work," and subparagraph (1), under that, will you state how long you have been selling that character of work in the manner described in column 2 on this exhibit?

A. Oh, for a great many years. I don't know just how long, but it has been a good number of years.

Q. Well, has it been more than five years?

A. Oh, yes, I would say it was ten or fifteen years, anyhow.

Q. Turning the page to page 4-G of Commission's Exhibit 547, will you look at paragraph marked (2), and state how long you have been selling that character of
36273 work in the manner described in column 2 on this exhibit?

A. I would say, anyhow, for 10 years.

Mr. Werle: I might shorten the questions just a little bit, if the witness will understand that as to each question I want to know how long you have been selling the character of work to which I refer, in the manner described in the second column of this exhibit.

By Mr. Werle:

Q. Now, will you look at paragraph (c) under paragraph (2), under "Railroad Work," and tell me whether you have had any such work in your area, to your
36274 knowledge? That is on page 4, Mr. McGovern.

A. No; I do not ever remember any work exactly of that character.

Q. All right.

Now, coming to the next heading, "Water Supply Development Work," will you answer my question as to subparagraph (a)(1)?

A. Ever since I have been in the business.

Q. With respect to the subheading (2) under that?

A. Not so long. I would say probably for the last eight or ten years.

Q. With respect to subparagraph (b) under that heading?

A. We have been doing that for, I would say, ever since I have been in the business.

Q. With respect to subparagraph (c) under the heading "Water Supply Development," (c)(1)? That is on page 4, Mr. McGovern.

A. We have been doing that for years and years; I would say for at least ten.

Q. And with respect to subparagraph (2) under paragraph (c)?

A. Not so long; I would say probably seven or eight years.

Q. Now, coming to the heading "II, Large Water Power, Flood Control and Irrigation Work," and subparagraph (a)(1), how about that?

A. I do not know of any large water power control that we have had located in the cities in our area.

36275 Q. So that you had no occasion to—

A. No occasion to sell that type.

Q. I see.

With respect to the next page, which is page 4-H of Commission's Exhibit 547, paragraph (2), will you answer my question as to that, please?

A. Oh, I would say at least eight or ten years.

Q. Now, with respect to paragraph (b).

A. We have been selling that ever since I remember.

Q. With respect to paragraph (c), under this heading, "Water Power," and so forth?

A. That same answer applies to that.

Q. Now, with respect to the next heading, which is marked "7, Manufacturers of Concrete and Cement Products," will you answer my question with respect to subparagraph (a)?

A. That probably has been over five or six years that we started selling those direct, if my memory serves me right.

Q. Would that be some time prior to or during the N.R.A. Code period?

A. I would say along about that time; yes, sir.

Q. With respect to subparagraph (b) under that heading?

A. That is also true.

Q. The same as with respect to the prior paragraph.
A. Yes, sir.
Q. Will you answer my question with respect to
36276 subparagraph (c) under that title "Manufacturers of Concrete and Cement Products"?
A. Well, that probably all happened about the same time; I would say five or six years.
Q. That is, you say (a), (b), and (c), under that heading, you have been doing all of those about the same length of time?
A. Yes, sir.
Q. Five or six years?
A. Yes.
Q. Would that have been prior to this occasion in May or June, 1935, when you first saw a copy of that paper?
A. Oh, yes.
Q. Thus far, have we come to any of these which you have not been following for some period of time?
A. No, sir.
Q. Prior to June, 1935?
A. Not that I see.
Q. With respect to the next heading on page 4-H, headed "8, Commercial Concrete Mixing Plants," will you answer my question with respect to subparagraph (a)?
A. I would say we were selling mixing plants direct for at least 10 years.
Q. Now, turning a page to page 4-I of the same Commission's exhibit, will you answer my question with
36277 respect to subparagraph (a) under the heading "City, Town, or Village Work"?
A. We have sold that through dealer ever since I can remember.
Q. In the manner described in the righthand column of this exhibit?
A. Yes, sir.
Q. With respect to the next paragraph, (b).
A. That is also true—the same answer.
Q. Now, will you answer my question with respect to the next subparagraph (c)?
A. Yes, sir; that is true, too.
Q. Now, when you say "that is true," you mean that also ever since you have been in the business; is that correct?
A. Yes, sir; we have sold those in that method.
Q. With respect to paragraph No. 10, "Only Industrial

and Public Utility Work," will you answer my question with respect to paragraph (a) and (b) on that?

A. We have been doing that, I would say, ever since I have been in the business.

Q. With respect to both of those paragraphs?

A. Yes, sir.

Q. And you have already covered, I believe, paragraph (c) in another connection, but will you answer my question with respect to subparagraph (c) in any event?

36278 A. That has probably been within the last eight or ten years that we started selling those direct.

Q. Now, the last one in this exhibit with respect to that is "Miscellaneous Work." Did you have any policy of that character, can you say, prior to that time?

A. Oh, we have always sold those as outlined.

Q. Now, in some of your answers in that connection, Mr. McGovern, you have stated "As long as I can remember." As to that, will you make it clear?

A. Well, as long as I have been in the cement industry.

Q. I see.

A. That is what I meant by that.

Q. Now, will you refer to Commission's Exhibit 813-2-B, Mr. McGovern, which is your announced policy of May, 1935, and will you tell us what has been your practice with respect to that policy? Have you followed that strictly since then, or have you varied it from time to time?

A. Well, there have been some variations from time to time, but, as a whole, I would say that we follow it pretty well; yes, sir.

Q. Can you tell me what variations you have in mind?

A. Well, there is one of this W.P.A. cement, emergency relief purchases. That is particularly the one that I see here just offhand.

Q. And under your May, 1935, policy, how were 36279 you selling that?

A. Through the dealer.

Q. And in all States where you have been doing business?

A. Yes, sir.

Q. Now, with respect to the variation, can you tell us how that came about?

A. I believe it was in 1937 that we found some of the plants in Alabama were quoting certain types of job, that

is, on which W.P.A. asked bids direct, and consequently, after a short period, why, we immediately met that competition. That also happened later on in the State of Tennessee, Georgia, Mississippi, North and South Carolina.

Q. You said you met that competition. Why did you meet that competition?

A. Well, if we did not, we would not be in line with competition,—if we did not meet the prices that they quoted.

36280 Q. Mr. McGovern, will you tell me when in 1937, if you can recall, that you first encountered these variations?

A. As I remember, the first direct bid we made to W.P.A. was in June, 1937.

Q. In June?

A. That is my recollection.

36281 Q. Now, you said that these conditions changed in several States. Over what period of time did it occur?

A. Oh, I would say over a period of probably a year, maybe not so long.

36282 Q. Mr. McGovern, with respect to this subject of selling dealers, and direct,—selling dealers and selling direct,—has there been any occasion where you have known beforehand how your competitors were going to sell a certain kind of work?

A. No, sir.

Q. Now, are you still selling this W.P.A. work direct in your entire sales area?

A. No, sir.

Q. Are you in some parts of it and not in others; is that the situation?

A. That is true; yes, sir.

Q. What has been your experience as to whether or not the W.P.A. has requested f.o.b. mill prices or f.o.b. delivered prices, Mr. McGovern?

A. Some places have requested delivered prices and some places have requested both delivered and f.o.b. plant.

Q. Does that depend upon the State that it was in?

A. It seems to; yes, sir.

Q. What State—

A. Alabama and Mississippi are asking for f.o.b. mill prices; Tennessee, Georgia, and the Carolinas, Ken-

36283 tucky, ask for delivered.

Trial Examiner Norwood: Now, confine your testimony to the time prior to July 2, 1937, unless it is especially solicited on something.

Go ahead.

A. I would say prior to July 2, the only State that was asking for other than delivered prices was Alabama.

By Mr. Werle:

Q. Now, do you have occasion to quote on State highway bids, Mr. McGovern?

A. Yes, sir; occasionally.

Q. And what States do you quote to in that connection?

A. Oh, Tennessee, Kentucky, and Mississippi, generally.

Q. And how do they purchase cement? Do they buy it direct?

A. Yes, sir; direct.

Q. Now, have they requested—have their invitations called for destination prices or mill prices?

A. Destination prices.

Q. How long has that been true?

A. Oh, ever since I have been in the business.

36285 Q. What has been your practice on State highway lettings? Will you tell us what prices you quote on such lettings?

A. We quote our regular commercial prices.

Q. And where do you get those prices from?

A. From our card index.

Q. Do you have reference to cards, such as Respondents' Exhibit 2651-L, for identification?

A. Yes, sir.

Q. Is that what you meant when you referred to your card index?

A. Yes, sir.

Q. Have you, with respect to any bid that your company has submitted on State lettings, had any agreement or understanding with any competitor company or with any Respondent with respect to the prices that you or they would quote?

A. No, sir.

Q. Have you at any time on such bids ever had any understanding or agreement as to the method by which you would determine the price that you quoted?

A. No, sir.

Q. Or have you had any understanding with respect to the points or destinations at which you would
36286 quote or refrain from quoting?

A. No, sir.

Q. I show you Commission's Exhibit 1339, Mr. McGovern, which is an invitation sent out by the Procurement Division of the Treasury Department in April of 1938. Did your company receive that invitation?

A. Yes, sir.

Q. Did your company submit a bid?

A. No, sir.

Q. Well, who made the decision in your company not to bid on that invitation?

A. Mr. Monday and myself.

Q. Did you discuss it with Mr. Monday, in person?

A. Yes, sir. I went over to Knoxville and we sat down and went through this proposal, paragraph by paragraph, and then decided we would not submit a bid.

Q. Will you tell me whether or not it is customary in your company to usually discuss Government invitations with Mr. Monday before you decide what you are going to do?

A. No, sir.

Q. Will you explain why you discussed this particular invitation with Mr. Monday?

A. This particular invitation was so different from any we had received from the Procurement Division, that I needed a little help on it, and for that reason, why, I went over to Knoxville and discussed it with Mr.
36287 Monday.

Q. And as to its being different, as you put it, will you state in what respects it was different?

A. Well, in the first place they did not tell you how much cement they were going to take; they did not agree to take any; they also said that on any construction where Government money was involved that they had a right to deliver the cement on those, which, of course, would have interfered very materially with our dealer business; and, then, it was necessary to set aside a good many bins of tested cement in case they did call on you for a substantial amount on short notice—just a lot of things in there that we did not like. Speaking for myself, I did not care particularly for the odor of it.

Q. Did you at that time have any discussion or com-

munication with any of your competitor companies with respect to it?

A. No, sir.

Q. Did you know whether or not any of your competitors were going to submit bids on that invitation?

A. No, sir.

Q. Did you tell any of your competitors whether or not you were going to submit a bid on that invitation?

A. No, sir.

36288 The witness identified Resp. Exs. 2701 A and B and 2702 A, B and C, as a letter from a building supply dealer in Atlanta, Georgia and the witness' reply; also two letters from another building supply dealer in Atlanta, and the witness' reply.

36288 Q. Do these papers accurately reflect any policy of the Hermitage Company?

A. Yes, sir.

Q. How long have you had the policy reflected in those letters?

A. Oh, I would say for quite a good many years before they were written.

Q. Do they still represent your policy?

A. Yes, sir.

Q. Does the policy set forth in Respondents' Exhibits 2701 and 2702 have any relation to one of your reasons for not bidding on this Procurement Division invitation?

A. Yes, sir.

Trial Examiner Norwood: This is an expression of that policy made in due course of business to one of his dealers. To what does this policy relate, anyway?

Mr. Werle: I believe it is in connection with blanket commitments. Is not that so, Mr. McGovern?

The Witness: One of them is; yes, sir.

36291 (RESP. EXS. 2701-A, 2701-B, 2702-A, 2702-B, and 2702-C, were offered and received in evidence.)

By Mr. Werle:

36292 Q. Tell me this: Was there any single reason why you did not respond to Commission's Exhibit 1339?

A. No, sir.

Q. Did you decide not to quote on that invitation as the result of any communication, understanding, arrangement, or agreement with any other Respondent?

A. No, sir.

Q. Commission's Exhibit No. 785, Mr. McGovern, refers to bids taken by the U. S. Engineers Flood Control work at Memphis, in October, 1931. First, have the various Mississippi River Flood Control projects of the Government been within your normal marketing area?

A. Yes, sir.

Q. And have you received invitations to bid on those from time to time?

A. Yes, sir.

Q. I show you Respondents' Exhibit 2703-A to E, for identification, which purports to be an invitation for bids by U. S. Engineers, to be opened in November, 1931,
36293 and ask you if you recall whether or not you bid on that invitation (handing documents to the witness)?

A. No, sir; we did not.

Q. Would you please explain why you submitted no bids on that, if you can recall, and if you cannot recall, refresh your recollection from that invitation.

A. Well, they asked for the bids f.o.b. barges, and there is a competitive plant located right on the river in that area, and they can load cement on their barges a good deal cheaper than they could afford to come up to Nashville and have it loaded on their barges there, because they do take into consideration the distance that they have to tow in making the award.

Q. Did you feel that you were able to make a price which would be sufficiently low to be competitive in that situation?

A. No, sir; we did not.

Q. Is that the reason why you did not bid?

A. Yes, sir.

Q. Now, in refraining from bidding, was it because of any understanding or agreement with competitors?

A. No, sir.

Q. Now, Commission's Exhibit No. 789 is an abstract of bids received at the U. S. Engineers Office in Nashville, I believe in August or September, 1933—yes; to be received August 25, 1933.

36294 The witness identified Resp. Ex. 2704 A and B as a photostatic copy of the original Hermitage bid. The United States Engineers Office in Nashville made it for him.

Q. Would you look at the prices which you quoted on

that bid, Mr. McGovern, and tell us, if you can, how those prices were determined?

A. As I remember it, we took the lowest land-grant rates from mills in that area, and figured the lowest delivered prices at Nashville, and bid f.o.b. our mill, also f.o.b. the incline, as asked for in the proposal.

Q. Do you recall where you got the land-grant rates from?

A. My memory is from U. S. Engineers Office at Nashville.

36295 The witness identified Resp. Ex. 2705 as a tabulation asked for in that proposal. The witness got it from the United States Engineers Office; Resp. Ex. 2706 A, B as a letter and the enclosure (which) came to his attention. The letter is a letter to him from the chief administrative assistant, Mr. Harbison, from the United States Engineers Office, Nashville, under date September 2, 1933.

Q. Can you tell me what you had done that
36296 prompted that letter from Mr. Harbison?

A. When this award was made to another company, I questioned the award, and this letter and this explanation was mailed to me after that time.

Q. You say you questioned the award. Did you discover to whom the award had been made from Respondents' Exhibit 2705?

A. Yes, sir.

Q. Well, before you go into an explanation, what made you think that something about the award that ought to be questioned? Did you believe that it had been made to the lowest bidder, or did you believe that it had not?

A. I was afraid it had not.

Q. All right. Now, you can go ahead and tell us why.

Trial Examiner Norwood: Now, is that a copy from the Engineers Office?

The Witness: Yes, sir.

Mr. Werle: Yes, sir.

A. Well, the reason—another reason I questioned the award was that they had asked for an unloading price from the car to their boat, and I know that, or I knew, rather, that the man that was unloading gave them a better price on our cement than he did on our competitor's, and I thought I had it in pretty good shape.

36297 By Mr. Werle:

Q. You say you thought you had it in pretty good shape?

A. I mean for the low bid.

36299 Mr. Paulson: That does not go to the issues. There is nothing in the issues about that. We put in the bid abstract, if that is what is in, and this situation, to show the destination prices that were bid, the manner of bidding them, and that is what is in issue. If they want to refute that, all right, but that is not what they are introducing this for. They are introducing this to show, Mr. Werle says, that the Government buys on the basis of a destination cost.

Mr. Paulson: There is no dispute about that at all.

Mr. Paulson: There is nothing in issue about that.

36300 (RESP. EXS. 2704-A, B, 2705, 2706-A and 2706-B were offered and received in evidence.)

By Mr. Werle:

Q. Mr. McGovern, in connection with this nine-cent per barrel unloading charge under the heading "Hermitage Company" on Respondents' Exhibit 2706-B, did you have any participation in connection with that nine cents unloading charge?

A. Yes, sir.

Q. To what extent?

36301 A. To the extent that I had worked before with this unloading concern, and being close to them, and in position to give them prompt switches, where his track would not be cluttered up, he told me he would give me an advantage of two cents in unloading our cement, and he so made that price to the Government.

By Mr. Werle:

Q. Prior to responding to this invitation, Mr. McGovern, which is Respondents' Exhibit 2704-A and B, did you have any discussion with anyone in the Engineers Office about it?

36302 A. I had a talk with Mr. Harbison and asked him if he would accept a bid from us trucking the cement from our plant to the dam, which was located less than 10 miles from our plant, and showing him where we could make him a better truck delivered price than he could possibly get on account of this loading, towing, and unloading again at the dam. He advised me he could not accept

that because the other competitors were not in position to truck, and consequently would give me an advantage.

By Mr. Werle:

Q. Did the Government carry out the award to the Alpha Company in that situation?

A. Yes, sir.

36307 Washington, D. C.,
April 11, 1940.

36309 E. W. McGOVERN thereupon resumed the stand and testified further as follows:

Direct Examination by Mr. Werle (Continued)

Q. Mr. McGovern, just one further question: You recall this discussion that you had with Mr. Harbison prior to your submitting a bid on that invitation which was Commission's Exhibit 789.

A. Yes, sir.

Q. At that time, in September of 1933, had you already announced the discontinuance of commercial trucking?

A. Yes, sir.

Q. Then I want to call your attention, Mr. McGovern, to Commission's Exhibit 783, which is an abstract of bids on the Mississippi River Flood Control work, received by the United States Engineers in Memphis, opened June 11, 1931.

36310 The witness identified Resp. Ex. 2707 A to L as a proposal from the War Department at Memphis, Tennessee asking for bids on approximately 240,000 barrels of cement. This is Hermitage's office copy of the bid on the Government exhibit just referred to.

Q. The Government exhibit on this bid, both show you bid a unit price of $1.30 per barrel. Will you tell us how you arrived at that price?

A. My memory is that on the bid prior to this our competitor located over on the river bid this price. We were in hopes that maybe he would raise his price and we could be low.

Q. What competitor was that?

A. Marquette.

Q. Now, what is this portion of this invitation, Respond-

ents' Exhibit 2707-L? Was that any part, or did that play any part in this invitation to bid?

A. Yes, sir; this is space that you have to furnish them for their laboratory to do their own testing at your plant.

A. And in order to qualify under the bid, do you have to make available such space as that?

A. Yes, sir.

Q. Did you have any communications with any other bidder prior to submitting this price of $1.30 f.o.b. mill?

36311 A. No, sir.

Q. And that figure of $1.30 was determined in the way you have already described it; is that correct?

A. Yes, sir.

Q. I show you a copy of Commission's Exhibit 783, which is the abstract of those bids. Will you look at the lefthand column under the name and address of bidder, and then the second column, and tell me whether or not below the figure $1.30 unit price, shown on that abstract under your company's name, whether any of these other figures were—any part of them bid, and, if so, which ones were?

A. No, sir. They were no part of our bid. This is what the Government used in arriving at what it would cost them delivered to destination.

Q. That is the figure $1.026?

A. Yes, sir.

Q. .16 and .03791?

A. Yes, sir.

Examination on Voir Dire by Mr. Paulson.

Q. Mr. McGovern, do you know whether the
36312 destination price that you bid on this destination is related to a base point?

Mr. Werle: Now, wait a minute. I object to that because there is no showing that there was any destination price bid—an f.o.b. mill bid.

Trial Examiner Norwood: Was the destination price bid?

The Witness: No, sir; bid them a mill price.

Mr. Paulson: I will take out that word "destination" out of that, and it now reads—

Trial Examiner Norwood: Read the question.

(Question read as follows:

"Q. Mr. McGovern, do you know whether the price that you bid on this is related to a base point?")

A. I would say that that was the same price that Marquette was bidding before at their plant.

By Mr. Paulson:

Q. What plant of Marquette?

A. Cape Girardeau, Mo.

Q. Was there a base at Cape Girardeau?

A. I would say there was a mill price there; yes, sir.

Q. What was that mill price?

A. I believe it was $1.30.

36313 Q. Was it a recognized base price?

A. I do not know just exactly what you mean by "recognized," Mr. Paulson.

Q. Well, did you find in checking the field, as you put it, or did you find in the course and conduct of your business that some of the destination prices were controlled by a Cape Girardeau base, or related to a Cape Girardeau base?

A. I do not agree with you just exactly with that phraseology, with a base, but I would say yes, that is correct.

Q. What was the base at Cape Girardeau when you submitted this bid?

36314 A. My understanding or my records were $1.30 mill price, the same as we bid at Nashville.

Q. You say the Cape Girardeau base was $1.30.

A. Yes, sir; and we bid the same price at Nashville, $1.30.

Q. Where was this cement to be used, Mr. McGovern?

A. I think it is stated there at points along the Mississippi River, I think from Caruthersville, Mo., down to probably close to Memphis; they use that cement up and down the Mississippi River.

Q. What is the freight rate from Nashville to those points? Can you answer that?

A. No, sir; I could not tell you offhand.

Q. How did you contemplate shipping this cement?

A. By barge.

Q. By barge, you say?

36315 A. Yes, sir.

Q. What was the barge rate from Nashville to these points?

A. I think you will see, Mr. Paulson, that that was de-

livered to the Government barges, and they figured their own towing cost to arrive at their destination cost.

Q. Do you know what the Government figured the towing cost to be from Nashville and from Cape Girardeau?

A. I think you will find it on that tabulation in making their delivered price.

Q. Did you know what they figured when you
36316 submitted your bid?

A. I am satisfied it shows on that proposal; yes, sir; what they figured. I believe they show it; they show what their figures, up or down the river, was, so much per ton or per barrel. I think they stipulate that in their proposal.

Q. What I am trying to get at is, how did you know you were going to be competitive when you bid $1.30 here?

A. Well, to be perfectly honest, I did not know that I was. I was just hoping I might be, taking past bids into consideration, I did not have much hope.

Q. Had there been some lettings for cement for destinations along the same points just prior to this?

A. I do not know how soon, but there had been some. They brought up one here yesterday, I believe it was, on which we did not even submit a figure because we figured we could not compete with a plant located right on the river that could deliver it to the Government barges practically at the point where a lot of it would be used.

36317 (RESP. EX. 2707-A to 2707-L, were offered and
36318 received in evidence.)

Direct Examination (Continued) by Mr. Werle.

Q. Mr. McGovern, in determining this price that your company quoted of $1.30 f. o. b. your mill, did you deduct any freight rates from anything to arrive at that price?

A. No, sir.

Q. Did you add any freight rate to anything to arrive at that price?

A. No, sir.

Q. And had there or had there not been bids received prior to this which the Marquette Company, under similar circumstances, had quoted $1.30 f. o. b. their mill?

A. That is my recollection, there had; yes, sir.

Q. What has been your practice, the practice in your company, Mr. McGovern, with respect to submitting f. o. b.

mill bids to the Government where they have been requested?

A. Well, for a period of time, I would say up until the Code, if my memory serves me right, we bid them a price f. o. b. mill wherever they asked for it.

Q. Now, prior to the Code, do you recall what the Government's practice was as to calling for bids f. o. b. mill or f. o. b. destination?

A. I would say that on quite a good many of them they called for destination and mill, but, of course, at
36319 that time we did not have a great many Government bids.

Q. Do you recall any occasion prior to the Code where the Government asked for an f. o. b. mill price that you did not give it?

A. No, sir; I do not remember any.

Q. Now, then, since the Code began, what has been your practice with respect to submitting f. o. b. mill bids to the United States Government?

A. Well, we, of course, during the Code, why, we bid the filed prices with the Code Authority until someone filed a price with a control clause, and we adopted that and used that until some time after the Code. Since then we bid them both ways.

Q. When you say "both ways," what do you mean?

A. F. o. b. mill and Government destination cost.

Q. Now, when you adopted that so-called control clause, did you do that because of any understanding or arrangement or agreement with any competitors?

A. No, sir.

Q. Or with any Respondent?

A. No, sir.

Q. And under the control clause, where you used it, did the sale take place at a mill price or at a destination price?

A. At the destination price.

Q. The sale took place at that price?

36320 A. Oh, not on Government bill of lading.

Q. That is what I mean.

A. It would take place at the mill because that is where they would have to take it.

Q. Now, you said that shortly after the Code you again began to quote some mill prices, and then at other times destination costs. Can you explain what caused you to change and vary your practice?

A. What we were trying to do was to meet competition so we were bidding them both ways in hopes we would be competitive.

Q. Had you found that competitor companies had quoted both ways, or one way or the other on occasion?

A. Yes, sir; we found out some were quoting one way and some another.

Q. Since the period of the N. R. A. Code, have you found that prices which your company has quoted the Government have always been the same as the prices of competitor companies?

(Question read.)

Trial Examiner Norwood: The objection is overruled.

A. They have been different.

By Mr. Werle:

Q. Would you say that that is just in isolated
36321 instances, or has it been frequent, or what has been the extent of it?

36324 A. I would say they have been frequent.

Q. Now, prior to the N.R.A. Code for the Cement Industry, did you give consideration to land-grant rates available to the Government in connection with your prices?

36325 A. Yes, sir.

Q. During that period prior to the Code where did you obtain them?

A. Well, we got them from the railroads, from The Cement Institute, and also from the Government on lettings, and where they had shown the rate to determine the award.

Q. Well, I think the record shows that the Institute land grant rate service did not begin until some time in 1935. Now, my question was directed at the period prior to the N.R.A. Code.

A. Well, from the railroads, and also from the Government.

Q. Did you get any land-grant rates from The Cement Institute at any time other than the period when it had this land grant disseminating service that is referred to in the record?

A. No, sir.

Q. During the Code, did you give consideration to Government land-grant rates in connection with your prices?

A. Well, during the Code, of course, we quoted the price that had been filed with the Code Authority.

Q. So that, did you or did you not give any consideration to this question of land-grant rates?

A. Yes, sir.

Q. Now, during the period that the Institute disseminated Government land-grant rates, did your company obtain rates from the Institute:

36326 A. Yes, sir.

Q. Have you obtained land-grant rates from the railroads, as well?

A. Yes, sir.

Q. The record in Commission's Exhibit 171 shows a bid by your company to the U. S. Engineers Office, Vicksburg, open September, 1935.

Let me show you a copy of the abstract and ask you if you recall that bid (handing document to witness).

A. Yes, I remember that bid.

The witness identified Resp. Ex. 2708 A and B as Hermitage's office copy of the bid it submitted on this letting referred to in Com. Ex. 171. The prices which Hermi-

36237 tage quoted on that letting are determined in a way from Resp. Ex. 2709 and 2710; Resp. Ex. 2710 as Hermitage's commercial price card for the Vicksburg destination. It was Greenville. Hermitage submitted its commercial price at that destination.

36329 (RESP. EXS. 2708-A, 2708-B, 2709, and 2710, were offered and received in evidence.)

By Mr. Werle:

Q. Now, Mr. McGovern, with respect to your bids to the United States Government, when destination prices have been called for, what has been the practice of your company with respect to the destination price that you quote?

A. We quote our regular commercial price at that point.

Q. Do you do that as the result of any understanding or agreement with any Respondent companies?

A. No, sir.

Q. Why do you do that?

A. Because that's the competition we have to meet, and we find the lowest price quoted at that destination, and then that becomes our commercial price at that point.

Q. Now, when you have had these land-grant rates involved, have you explained to us how you determine the price that you will quote in that instance?

A. What we do, we take the lowest mill price in
36330 that area, plus the lowest land-grant rate, and it makes the lowest delivered price to the Government.

Q. And you have gotten the land-grant rates from the sources you have already stated?

A. Yes, sir.

Q. Why do you do that ~~in that~~ way?

A. Well, to try to be competitive.

Q. Do you have any understanding or agreement or arrangement with any other Respondents that you are going to do it that way?

A. No, sir.

36331 Mr. Werle: I have here the bids filed by this company with respect to the various Commission's exhibits, and price cards, and land-grant information.
36332 I do not pretend to go through the procedure of offering them all, or marking them all, but I did want to have one of them which I think can be taken as fairly illustrative of what this company has done with respect to the bids which are in evidence affecting them.

By Mr. Werle:

Q. Now, is that correct, Mr. McGovern?

A. Yes, sir.

Q. Then, this one, Respondents' Exhibit 2708-A and B, and 2709 and 2710, in addition to the answers that you have given to certain questions on the subject of bidding, does that cover the method that your company has used in determining its prices on these bids which I mentioned?

A. Yes, sir.

Q. During the period, Mr. McGovern, that you have been using land-grant rate information, have you sometimes had information as to different rates, one of which was higher or lower than the other?

A. Yes, sir.

Q. In such a case as that, what do you do?

A. We use the lowest rate.

Q. Why do you do that?

A. Well, because we figure if we don't, we won't be competitive.

Q. During the period that you received land-
36333 grant rates which were sent out by The Cement Institute, did you at that time have any understanding with any other Respondent that you would use the rate information which was so provided?

A. No, sir.

Q. How long, by the way, has your company been a member of The Cement Institute, Mr. McGovern?

A. If I remember correctly, since it was formed.

Q. And during that period, has your company—have the practices and policies of your company been governed or guided by The Cement Institute in any way?

A. No, sir.

Q. Has The Cement Institute been considered by your company as an interpreter or formulator of the policies or practices of your company?

A. They have not.

36334 Q. Do you recall any occasion when your company has referred any question of policy to The Cement Institute to be decided?

A. I don't remember any; no, sir.

Trial Examiner Norwood: Have they ever taken up any questions of policy with you?

The Witness: No, sir; not that I remember of, Your Honor.

By Mr. Werle:

Q. Does the Hermitage Portland Cement Company have any understanding or agreement with any other Respondent to employ or use any particular method of quoting prices?

A. No, sir.

Q. Do you have any understanding or agreement that your company will sell only at delivered prices?

A. No, sir.

Q. As a matter of fact, does your company sell only at delivered prices?

A. No, sir.

Q. Do you have any understanding or agreement whereby you recognize certain mills as basing points or base mills?

A. No, sir.

Q. Do you have any understanding or agreement that your company will quote prices which reflect some lowest combination of some base plus freight?

36335 A. No., sir.

Q. Do you have any understanding or agreement or arrangement with any outside agency to quote prices identical with the prices of your competitors?

A. No, sir.

Q. Do you have or have you ever had any agreement or understanding with competitors to classify your customers one way or another as to whom you would sell direct, or whom you would sell through a dealer?

A. No, sir.

Q. Does the Hermitage Portland Cement Company have any arrangement or agreement or understanding whereby it adheres to any particular terms or conditions of sale?

A. No, sir.

Q. By the way, does your company sell in an area where you meet competition of imported cement?

A. No, sir.

Q. Has your company ever taken any steps for the purpose of combatting imported cement?

A. No, sir.

36336 *Cross-Examination by Mr. Paulson.*

Q. Mr. McGovern, you frequently have found,
36337 have you not, that under a sealed bid your bid had been identical with those of your competitors.

A. Yes, I find that a great many times.

Q. How do you explain that fact?

A. Well, those bids, as a general rule, are commercial prices delivered at that point, and we naturally know what our prices are at that point.

Q. Is that the whole story?

A. Yes, I would say so.

Q. What if you bid at a point where there were no commercial prices,—you have done that, have you?

A. I am satisfied we have, yes.

Q. And you have had identical bids at that point?

A. I am satisfied we have.

Q. How do you explain that?

A. That goes back to after you find a common point, a common mill price and have no dealers where you could pick up a commercial price at that point, why, we use the mill price plus the lowest point that will make the

price to that point; of course, being in line with the other prices in that vicinity.

Q. Well, now, you do that in all of your bidding,—in all of your quotations, do you not? I mean, you do that—I mean, you apply that formula method of arriving at destination prices?

A. That is, if we don't find a different price at destination?

36338 Q. Yes.

A. Of course, what we do is meet the price at destination regardless of how it is made up.

Q. Oh, yes, I understood you would say that. I am wondering if in the normal instances you do not use the formula method and find that that gives you the destination price.

A. Sometimes it does and sometimes it does not.

Q. Well, in the great majority of cases?

A. I would say that is correct.

Q. The formula method gives you your destination price.

A. Yes, I would say that is correct.

Q. As a matter of fact, do you know of any destinations in your whole sales territory that is not ascertainable by the application of the so-called formula method?

A. Yes, I do.

36340 Q. Will you tell us what destinations, or group of destinations do not fit into the category I have attempted to indicate by my question?

A. I didn't say a group of destinations.

Q. No.

A. I say I remember one instance now.

Q. What is it?

A. It is Kingsport, Tenn., where there is a minimum freight that does not make back to a mill price.

Q. Any other point in your sales territory?

A. The only points I remember of now, of course the points we have at Nashville that we sell at railroads, that figures back to no basing points.

Q. How do you figure that?

A. F.o.b. their tracks—not tracks, because we own the tracks into the mill—but adjacent to it.

Q. Otherwise, in your whole sales territory every destination point is related to a base?

A. Well, that has not always been the case, of course;

then, as I have been away from the office a week I would say there might have been some changes in that time.

Q. About how many changes do you find in a year?

36341 A. Well, that depends; some years we have had numerous; others, not so many.

Q. Since May, 1935, have you had any changes?

A. Well, probably has been a great—been fewer cases since 1935 than there was prior to that time.

Q. I am saying "change"—what I mean is, have you found any destination—let us say, many destination points that have not been related to a base point? That is what I am asking you about.

A. I know of quite a few.

Q. Since 1935, can you tell us here, briefly, what destinations?

A. I don't know.

Q. Can you tell?

A. I can't be definite about the year, but I do remember that a few years back that there were quite a good many, as you call, arbitrary prices up through East Tennessee; that was also true at Knoxville.

Q. Yes.

A. And I could say probably prices at the ports were more or less arbitrary; there were no mills there.

Q. What did you have in mind when you said "quite a few years ago?"

A. I say I don't know when it comes to years; I couldn't say whether two, four or five, unless I have

36342 something to refresh my memory; I can't tell you exactly when these things happened from day to day.

Q. Does your memory serve you as to whether or not you have already named all of the points that were not related to a base since 1935?

A. Well, I would say since 1935 I have made some prices that were not related to a basing point.

Q. When you came into the cement industry was the method of pricing substantially the same as it is today?

A. When I came into the industry I traveled the State of Florida, and at that time, why, I carried a tariff, a railroad tariff, and the prices through that area were made over Jacksonville. Of course, there was no mill at Jacksonville. Now, of course, how that all came about, or was

arrived at, I have no idea. I was green in the business, of course, but that is the way it was handled.

Q. When did you travel that Jacksonville territory?

A. In 1916.

Q. And when did you move into the territory you now have?

A. In 1919, and then I was out and back.

Q. When you moved into the territory that you are now in, did you find that the pricing methods in the cement industry were substantially the same as they are now?

A. I would say that that is a fair answer; yes, sir.

Q. And in using the method which you employ, that is what, again?

36343 A. The method that we employ, of course, is to meet competition at the destination regardless of how that competition is made up, whether it is mill price plus freight, whether it is an arbitrary, or just what it is, because that is the way we have to meet competition.

Q. What guides do you have to the destination prices that you have to meet?

A. What guides?

Q. Yes, what guides?

A. You mean, how do we know?

Q. Yes, how do you know.

A. Well, representatives are constantly calling at these points. If we are not in line we just can't do any business.

Q. What else do you have as guides besides checking by your representatives?

A. Of course, a change in price, the dealers in Nashville, as soon as they know of the change, they pick up the telephone and call me.

Q. Besides dealer information and salesmen information, what else do you have to tell me, or guide you in quoting destination prices? You already mentioned figuring back to base. I am trying to get you to tell us in your words how you understand that to work.

36344 A. Well, of course, as I told you a while ago, if we do not have a price; that is, at a point, no dealer there, or a destination price, what we, of course do, is to figure back to the lowest mill price plus the freight.

Q. How many base points are you affected by in your territory?

A. Let's see.

Mr. Brick: What period of time, Mr. Paulson?

By Mr. Paulson:

Q. We better make that 1937.

A. Well, now, let's see, probably—oh, I would say about 14 of them.

Q. Is that about the normal number of bases that affect your territory over a period of years?

A. Well, it varies from day to day. Of course, new mills coming in, have changed the picture more. When I first went in the business there were only about five mills, or six, down in that territory.

Q. Is your mill a basing point?

A. No, sir.

Q. Did you, in that fifteen, include the port prices down at New Orleans?

A. No, sir.

Mr. Werle: Neither did he say there were any port prices in New Orleans.

Mr. Paulson: I asked him did he include it.

The Witness: Well, there is a mill at New Or-
36345 leans. I did not include Savannah, Charleston, or the eastern seaboard points.

By Mr. Paulson:

Q. Do you give your salesmen freight rate books?

A. Yes, sir.

Q. That is Cement Institute freight rate books?

A. Yes, sir.

Q. Mr. McGovern, do you make a practice of establishing destination prices that are not related to a base point?

A. We have in one or two instances, as I remember, where there was water competition. In other words, where there were no rail points we take the closest point and deliver by river to a point not related to a rail point or a freight rate.

Q. In other words, you do not make a practice?

A. Not a practice.

Q. That is, the exceptions are very rare?

A. That is true.

Q. You, from your experience, have learned that
36346 your competitors make their price at the destination points in your sales territory by taking the lowest combination of base point price plus rail freight?

A. Well, I would say as a general rule, probably mill price plus the lowest freight makes in the majority of

cases, although there have been quite a good many exceptions over a period of years.

Q. Well, the practice is so general, though, that you would almost be safe in saying that it is the rule to make destination prices by taking the lowest combination of base plus freight?

A. Well, I would say by far the majority.

Q. In that respect, I want to show you Commission's Exhibit 877-B, which is a letter, which bears your signature in type there, and ask you if you wrote that letter, and if you recognize it.

A. Yes, sir.

Q. Now, will you read the second paragraph particularly.

A. That is, out loud, you mean?

Q. Well, yes. If you don't, I am going to.

A. (Reading): "This is to advise that we are meeting these filings with the exception of Colesburg and College Grove, which prices are in error."

Q. When you say "which prices are in error," did you have in mind the prices that had been filed there varied from the formal base price plus freight; is that 36347 what you had in mind?

A. What I had in mind was that these were not our prices to these points.

Q. Well, you said "they are in error." You are commenting here not about your prices but about somebody else's prices.

A. They were in error as regarding the prices we had to those points.

Q. Your prices to those points were base price plus freight, the lowest combination of base price plus freight; is that correct?

A. I would say that was probably true of Colesburg, but—

Q. Well, isn't that—

A. Let me finish my answer, please.

Mr. Brick: I suggest you let the witness finish his answer.

Trial Examiner Norwood: Let him finish.

A. —but College Grove is a point where there are dealers that we cover constantly, so we know the prices there. Colesburg is a very small place.

By Mr. Paulson:

Q. Which did you say?

A. Colesburg is a very small place, and that probably was the mill price plus freight. College Grove, though, is a place where we have dealers, and we cover that regularly. We knew what our destination price was there.

36348 Q. Was it the lowest combination of base price plus freight?

A. I would say that.

Q. When you said that the prices which you had been notified at those two points were sent in error, you had in mind that they were not the lowest combination of base point price plus freight; is that correct?

A. Yes, sir; I would say that that is correct, and we also knew that was not the price at College Grove, because we knew what the price was there covering that territory.

Q. While I have this volume of exhibits here, I want to show you Commission's Exhibit 813-X and Y, Exhibit 813-X and Exhibit 813-Y; it came from your company under the subpoena duces tecum, the record shows, and is a list of base point prices which is signed or at least bears the typewritten signature of Walter S. Wing. Did you receive that from Mr. Wing?

A. No, sir.

Q. Where did you get it?

A. As I remember, I asked Mr. Clicquinoi, he was the office manager of Penn-Dixie, and I asked him in a conversation one day if he would send me a list of the basing points because I knew they had a pretty complete list through the country.

Q. Mr. McGovern, will you look at this Commission's Exhibit 813-X, and tell me whether or not that is your handwriting on there.

36349 A. Yes, sir; that is my handwriting.

Q. Is that all the handwriting on there yours?

A. I believe it is.

Q. Now, Mr. McGovern, did you use this list, Commission's Exhibit 813-X, and Commission's Exhibit 813-Y, and the Institute freight rate books, to determine destination prices?

A. I would say what happened with that, I picked out the points that affected the territory and give them to our

traffic manager, Mr. Robine, who makes practically all those prices. He did use them in that connection.

Q. In conjunction with the freight rate Institute books?

A. Yes, sir; that is what we are using.

Q. There is no secret, is there, about the fact that destination prices in your sales territory are the lowest combination of base point price plus freight?

A. I would say substantially, but not entirely.

Q. You have already told us most of the exceptions, at least, have you not, since 1935?

A. I think so with the exception of probably some I have made.

Q. Mr. McGovern, the matter of ascertaining destination prices where commercial rates apply is comparatively simple, is it not?

A. Yes, sir.

Q. But where land-grant rates apply, what is the situation?

36350 A. Well, of course, they are not quite as simple because you do not have the quotations to pick up at the destinations. You have to be governed by the information you can get on the rates.

Q. Well, you cannot pick up the information at the destinations, and neither can you ascertain the freight rates definitely, can you?

A. Well, the only thing you can do is to get the cheapest freight that the railroads will quote you, or that the Government had used in previous bids.

Q. Isn't it the fact that the Institute engaged in filing of land-grant rates; that is, the collection and dissemination of land-grant rate information, to simplify the problem that confronted you with regard to making destination prices where land-grant rates applied?

36351 A. I say this, that it simplified in obtaining what the freight rates were probably; that is, to the best of their knowledge.

By Mr. Paulson:

Q. Well, before the Institute collected and disseminated land-grant rate information, did you sometimes obtain land-grant rate information from your competitors?

A. I have done that.

Q. Over a period of years and prior to the time the land-grant rates—

A. No, sir; I would not say over a period of years.

Q. When did you begin doing it, and over what period did you do it?

A. Mr. Paulson, we had very few proposals where the Government asked for that mill price up until this W.P.A. started. We only started bidding on W.P.A. direct, I think it was in June, 1937. So there was not any question involved there but for few points up to that time.

Q. Well, back in 1930, as I understand the record, the Government asked for some f.o.b. mill bids.

A. Yes, sir.

Q. And land-grant rates were involved in some of those invitations; do you recall any of those cases back as far as 1930?

A. No, sir; I could not say that I recall any bids I made in 1930, offhand. Of course, if I had the bid, I could, but just to guess whether I made any in 1930, I could not say.

36352 Q. Well, 1930, 1931, or 1932. In other words, do you recall your experience with regard to invitations for f.o.b. mill price in 1930, 1931, or 1932?

A. I am satisfied at that time there were a few, but there was not but very few of those invitations at that time.

Q. What did you do about land-grant rates in those days?

A. Well, we got them from the railroads if we could, or if there had been previous Government lettings, and, as I say, I had got some from my competitors.

Q. Yes. As a matter of fact, I think the record shows some information that competitors exchanged land-grant rates back in those days. I am wondering whether you recall having participated in exchanges?

A. Well, I do not think I have exchanged any, because I got the information, if I could, and if not I have asked my competitors; I don't remember an instance where they ever gave them to me unless I asked them, if they could help me on them.

Q. Is your mill on a land-grant railroad?

A. No, sir.

Q. Your nearest land-grant railroad is the Illinois Central; is it?

A. No, sir. I think the closest point for land-grant for us is going south towards Birmingham at Decatur, Ala.

Q. How far from your mill is that?

A. Oh, I would say it is probably a hundred
36353 miles; maybe a little more.

Q. What has been the practice of your company in bidding on invitations on cement where the Government requests f.o.b. mill bids and land-grant rates apply between your plant and the destination points?

A. At what time, Mr. Paulson?

Q. Well, let us say since the land-grant rate activities of The Cement Institute ceased.

A. Well, as I say, from the Code period we used the Government destination cost and used that for, oh, several years, I would say. Since that time we have bid them both ways. We have bid mill price and have bid Government destination cost.

Q. Well, do you have to know the land-grant rate that applies in order to make a price which is identical with those of your competitors?

A. Well, whether you know the exact land-grant, why, I would say that if you knew, if everybody knew the exact rate, the only thing you can use in making the price is to get the lowest obtainable rate. Now, the Government does not always use the same rate that the railroad uses when they make the award.

Q. Well, the virtue of The Cement Institute service was that if gave you knowledge of the lowest land-grant rate that would be used by your competitors, wouldn't it?

A. Well, they gave us the lowest land-grant rate that they knew of. That was not always the lowest rate.

36354 A. Well, that is true, but I say that the services were of advantage to you because it gave you knowledge of the lowest land-grant rate that would be used by any one of your competitors?

A. Well, I would say unless the railroad gave you a lower land-grant rate than you were using, or a lower land-grant rate.

Q. Well, during this period when you filed land-grant rates you would file that lower rate before using it, wouldn't you?

A. With the Institute?

Q. Yes.

A. I would not say that; no, sir.

Q. Well, you would not take advantage of your competitors?

A. I have done it many times, Mr. Paulson.

Q. That was not the general practice, though, was it, amongst your competitors to take advantage of each other?

A. Now, when you talk about the general practice of my competitors, I am not in position to speak for them.

Q. Do you know how many times you used a control clause; that is, how many bids you submitted in which you used a control clause?

A. No, sir; there have been quite a number of them. I could not give—I could not begin to guess.

Q. You said on direct that you bid f.o.b. mill at times when requested. Have you ever bid f.o.b. mill other than with the use of a control clause or by means of a
36355 control clause?

A. Do you mean prior to the code?

Q. After the code.

A. Yes, sir; I have bid mill prices since the code.

Q. That is, you made bids to the Government on which you did not fix the control clause?

A. That is where we bid for a flat price at our mill; yes, sir.

Q. Do you have those in mind?

A. Well, most of them were W.P.A. to Alabama.

Q. Did you know the destination?

A. Yes, sir.

Q. Oh, you knew the destination?

A. Yes, sir.

Q. Well, then, you would simply bid your commercial price at that destination less the commercial freight; isn't that true?

A. No, sir; these were where land-grant rates were involved, what we would do.

Q. And how would you determine—

A. Here is what we would do. Get the reporting service and go back and see what somebody had bid prior to the same point, and we would take the lowest price and bid that delivered to that point in order to try to be competitive.

Q. I do not understand how that would work out.

A. Here is the way it would work out, Mr. Paul-
36356 son: The Government in awarding these bids take the mill price which some of them were bidding, including us at times, plus the lowest land-grant that they could get, from the delivered price. If that was lower

than someone's Government destination cost, they would order it f.o.b. mill. We got some of those awards on that basis.

Q. Now, in the succeeding instances to the same destination, I am wondering what price you would bid.

A. Here is what we would bid: We would take the rate the Government figured, plus the price at the mill if it was awarded on that basis, and bid that. If it was awarded on Government destination cost that figured lower than that, and which a good many of them were, we would go back and bid the lower price where it had no relation to the mill price plus the lower freight.

Q. How many instances do you recollect on which you submitted f.o.b. mill bid,—what you call an f.o.b. mill bid?

A. I could not say definitely, of course; I would say probably at least fifty.

Q. I mean W.P.A. jobs?

A. Yes, sir.

Q. That is since 1937, is it?

A. Yes, sir.

Q. Were any of those made in 1937; do you recall?

A. I remember that the first one that we bid 36357 directly in Alabama was in June, 1937. Then it was from there on, because that was the first one we bid direct. Prior to that time we had been referring them to the dealers.

Q. Can you cite any f.o.b. mill bid that you made between July 2, 1937, and the Code period?

A. I do not remember offhand, but we—

Q. Well, isn't it true that the extent of your f.o.b. mill bidding since the inception of the Code has been on W.P.A. work?

A. I would say that that is true; yes, sir. I would say further, Mr. Paulson, that the requests we have for mill prices about 95 percent of them come from W.P.A.

By Mr. Paulson:

Q. Well, you have some that come from somebody else besides W.P.A.?

A. Yes, sir; in small numbers.

Q. And you bid f.o.b. mill on any of those?

A. Yes, sir.

Q. What do you have in mind when you say "yes, sir" to that?

A. Well, I would say this, I know of several we have of—now, whether it was prior to the filing of this
36358 complaint, or not, I could not tell from memory.

Q. Well, have you ever refused to bid f.o.b. mill when requested to do so?

A. Yes, sir.

Q. Why?

A. Well, the one that jumped into my mind there was that Procurement bid, in which they asked us for a mill price and we did not bid.

Q. Have you ever refused to bid on any other besides that Procurement proposal?

A. I do not remember any just offhand.

Q. Well, not any particular one. Do you think you have refused to bid on some others?

A. I declare I don't remember. We probably have, and maybe we have not. I am just not positive.

Q. Well, do you look with favor upon f.o.b. mill bidding?

A. Well, no, sir. I would not say that we look with favor upon it.

Q. Do you look with fear or trembling on it?

A. Well, I would not go that far.

Q. Well, what tends to restrain you from submitting f.o.b. mill bids upon requests?

A. Well, we do not object to bidding f.o.b. mill if we know where the cement is to be used. We have to have—

Q. What difference does that make?

36359 A. Why, it makes a lot of difference. We could not conduct our business unless we just made one flat price at the mill, and never varied from it. That would restrict us to a very small area.

Q. So long as you know the destination you can make a price which you can reasonably assume will be identical with those of your competitors, can you not?

A. We hope it will be as low as our lowest competitor.

Q. Your experience has led you to believe that you can make a price which will be identical?

A. I would say no, sir; you never know until they are opened.

Q. You are quite sure, anyway?

A. Well, I would not say; the majority probably are, but you are never sure about it until the bids are opened.

Q. Do you know of any destination point in your whole

sales territory where any competitor of yours quotes a different price for standard Portland cement from the price which you quote?

A. Do you mean openly?

Q. Yes.

A. No, sir; I cannot say offhand that I do.

Q. In other words, so far as you know, the price of your competitors and your price at all destination points in your territory are identical?

A. No, sir.

36360 Q. Well, so far as you know, they are?

A. No, sir; so far as I know they are not. My prices have been different from theirs, not openly.

Q. Well, I meant openly.

A. No, sir.

Q. Openly, so far as you know.

A. We tried to make ours, of course, as low as the lowest.

Q. And, to your knowledge, those of your competitors are identical with yours?

A. Yes, sir; I would say that that is a fair statement.

Q. Well, where is there any secret price cutting in your sales territory? I mean, in what avenues of the business is there secret price cutting?

A. Well, of course, by far the majority is on contract work where you sell direct to the contractor, but it has not been confined exclusively to that.

Q. Well, is there some, and, if so, how much secret price cutting to dealers?

A. Well, you only know what you do. You can surmise what the other fellow does, but I only know what I do.

Q. In the main, price competition, though, is confined to sales to contractors, would you say?

A. Well, I would say in the majority; yes, sir; but there have been a lot others.

Trial Examiner Norwood: Now, if a competitor

36361 made a secret price to a dealer, wouldn't he report that to you right away?

The Witness: If he was getting an advantage?

Trial Examiner Norwood: Yes.

The Witness: Why should he tell me, Your Honor? He wants to keep on getting that advantage.

Trial Examiner Norwood: Well, suppose he gets an advantage in a printed circular.

The Witness: Well, of course—

Trial Examiner Norwood: Does he report that immediately?

The Witness: Well, here is the thing: If you were going to give a dealer a secret price you would not broadcast it with quotations so that your competitor could pick it up and meet your prices.

Trial Examiner Norwood: Well, can they keep that secret any length of time?

The Witness: Well, no, sir; I would not say that they could, although you feel confident that something is going on, but you can't put your finger on just the exact amount.

By Mr. Paulson:

Q. What percent of your business is sold to contractors, Mr. McGovern?

A. Oh, of course, that varies, and I would say
36362 that, oh, probably twenty or twenty-five percent, maybe, in that neighborhood; twenty to twenty-five percent to contractors direct, you mean.

Q. Is that what it has been running for the past 10 years?

A. That is a guess on my part. We never keep it accurately. I could not tell you, just surmise it is around that much.

Q. It sometimes runs as low as ten, probably, up to twenty-five?

A. I doubt if it ever runs quite as low as ten.

Q. Does the State of Mississippi let its highway work to contractors?

A. Yes, sir.

Q. And Tennessee, does it let its work?

A. Yes, sir.

Q. In other words, did you bring them here with you to Washington when you came to testify?

36363 A. I didn't bring anything with me when I came to testify—

Mr. Werle: I object to that inquiry, anyway—

A. —except—

Mr. Werle: What difference does it make, and what business is it to Commission's Counsel whether he did or did not.

Trial Examiner Norwood: Well, the objection is overruled. Answer the question.

Mr. Paulson: Let me make it clear, now.

By Mr. Paulson:

Q. Do you have in mind any f.o.b. mill bids that you submitted subsequent to the Code, which, of course, is May, 1935, and the issuance of the complaint in this case, which is August—or July, 1937?

A. I don't remember any distinctly; no, sir.

Q. Except, of course, you have already told us about the one you made to W.P.A.?

A. That's right.

Q. In July?

A. Yes, sir.

Q. Any others that you have in mind?

A. Not that I remember.

Q. Well, wasn't one of the reasons that you did not want on 1339,—that is, the Government's proposal that we have talked about here, Commission's Exhibit 1339,—that you did not want to bid f.o.b. mill?

36364 A. I would say that that was probably one of the reasons, with a good many others; that was not the sole reason by a long ways.

Q. Was that proposal different from any proposal you had ever received theretofore, did you say?

A. Yes, sir; I don't remember ever receiving one like that.

Q. And you said principally because it called for yearly requirements?

A. No, sir; I did not say that principally.

Q. I understood that—well, one of the reasons.

A. That was one, that was one of the reasons for—

Q. That was one of the reasons?

A. That was one—I don't mind telling you the main reason, Mr. Paulson, I didn't think it was on the up and up.

Q. Where did you get that impression?

A. Well, it was sent out after this complaint; it was different from anything we had ever received, and I was just leery of it, and still am; I am still not sold on the idea that it was on the up and up.

Q. Well, you knew, of course, that the Government had desired to buy at the mill before that time?

A. Yes, sir; but not divided in zones—

Q. As a matter of fact—

A. —and a lot of other things in there, about 36365 putting it on any work where the Government had

any money on it, taking our highway business away from us, taking our homes, and just practically anything else that they wanted to.

Q. As a matter of fact, you were familiar at the time that you received that proposal, Mr. McGovern, were you not, with the fact that the Procurement Division had long before established that type of buying as a general policy for obtaining supplies such as fire extinguishers, tires, and petroleum—

Mr. Werle (Interposing): I object.

Trial Examiner Norwood: Let him finish his question. Go ahead, finish your question.

By Mr. Paulson:

Q. —petroleum, that is, gasoline, and so forth, were you not?

Trial Examiner Norwood: Wait a moment.

Mr. Werle: I object to that question, whether or not the witness is familiar with that—

Mr. Paulson: I can ask him—

Mr. Werle: (Continuing) —is entirely irrelevant, and it is just an attempt to get some elements injected into this record. There isn't any evidence in the record of that.

Why don't you ask him if he was familiar with the Procurement Division having asked for bids of that character on any other kind of goods before.

36366 Trial Examiner Norwood: Read the question.

Mr. Paulson: That is what I asked him.

Mr. Werle: Oh, no.

Trial Examiner Norwood: Read the question.

Mr. Werle: Then you are not saying what are supposed to be facts in the record.

Trial Examiner Norwood: Read the question.

(Last question read by Reporter.)

Trial Examiner Norwood: The objection is overruled. That is perfectly proper cross-examination.

A. No, sir; I wasn't familiar with how they were buying those other articles.

By Mr. Paulson:

Q. Do you know Mr. McNair, the Procurement officer down in Mississippi?

A. No, sir; never met him, as far as I remember.

Q. You have testified, Mr. McGovern, that since 1935

you kept a record of destination prices on price cards, have you not?

A. Yes, sir.

Q. How did you keep records of prices of destination points before 1935?

A. We had sheets that we kept them on in practically the same way as the cards, and we felt the cards were more serviceable, easier to handle, so we discontinued the sheet list, and just put them on cards.

36367 Q. How long did you continue to use those freight rate books which you compiled, Exhibit Nos.—

A. As I remember it, we used these (referring to documents) until we got the Institute freight rate books; I don't remember any in between.

Q. These books that I have referred to thus, prior, are Respondents' Exhibits 2656-A, et cetera.

Well, when you had those books, Respondents' Exhibit 2656-A, what was the necessity of having a sheet with the prices on it?

A. Well, it was just so much easier to check, look up the price to a point, than it was to go back to try to do some figuring on it, if you had the price in front of you. It was just more convenient, to save you going back to see what you had found at that point, or if you hadn't found anything at that point, figuring back as best you could to a mill price.

Q. Well, now, in the conduct of your business, you use the Institute freight rate book, Exhibit 1110-AA, for destination points in Tennessee, do you not (showing document to witness)?

A. Yes, sir; I think that's the book, practically that book.

Q. In how many instances do you suppose the information—I should say the last information on your price cards would vary from the sum of the lowest combination of basing points and freight rate figured from this book?

A. How many on our cards?

36368 Q. Yes, in how many instances do you suppose?

Mr. Werle: As of what date? May we have the time fixed?

Mr. Paulson: Well, for the purposes of this question. I think we ought to bring it up to date so the witness' memory will—

Mr. Werle (Interposing): I ask that the time be fixed.

Mr. Paulson: Well, I said 1930, at the present time, but I—the witness' memory will serve him as to 1937, why, in 1937, take 1937.

A. Well, so far as I know, with a few exceptions, that is probably correct.

By Mr. Paulson:

Q. In other words, then, the last information on your price card is for the town of Abiff, A-b-i-f-f,—would be what? Can you tell me by looking at this book what the last information on your price cards for that town would be?

36369 A. I couldn't even tell you where Abiff is, probably just a wide place in the road anywhere,—now, if you take a town—

Q. Now, find one of these towns that you recognize (referring to document).

A. Here is a town of Algood.

Q. Algood,—what is your destination price at Algood today?

A. Well, I would say that it is the lowest—

Q. What base?

A. I couldn't tell you.

Q. What base controls it? What base is it related to?

A. Well, I—I couldn't tell you, offhand, because it is up between Nashville and Knoxville, and it could be related to two or three.

Q. Do you know whether—

A. It could be Kingsport; it could be Ironton; it could be the Birmingham group; it could be Richard City.

Trial Examiner Norwood: Can't you determine that from the cards already in evidence?

The Witness: We haven't any card here for Algood, Your Honor.

36370 Mr. Paulson: May I see the card that was put in evidence here?

The Witness: Greenville, that was Greenville, Miss., card, Greenville, Miss.

Mr. Werle: I explained one of the grounds for offering the cards that they were different from other cards, and that they did not have any reference to a base, any base rates, or anything else on them. You cannot tell from the card.

Trial Examiner Norwood: You can tell how the prices stated on the card were made.

Mr. Werle: No.

Trial Examiner Norwood: You cannot?

Mr. Werle: No, it does not—

Mr. Paulson (Interposing): Did you put a card in for every Tennessee point?

Mr. Werle: I don't know. I offered some, and one was received, and what it is I don't know.

Mr. Paulson: Two were received, as I recall.

Mr. Werle: This one in connection with the bid in Greenville, Miss., Respondents' Exhibit 2710 (indicating).

Mr. Paulson: I thought you received two.

Trial Examiner Norwood: You may examine him to see whether or not that card is really representative.

Mr. Paulson: Well, I am seeking to find out from
36371 the card if the card information is not the lowest combination of base point price plus freight, but I think I have already covered that.

By Mr. Paulson:

Q. It is true, is it not, Mr. McGovern, that that—

A. If that makes the lowest delivered price, I would say yes.

Q. And you have already told us that in the majority of cases, in the vast majority of cases, the lowest combination of base point price plus freight does make the—

A. (Interposing) You still say "base point price," and I say "mill price."

Q. Yes.

A. But I think we understand each other.

Q. Yes.

A. I would say that is substantially correct; yes, sir.

Q. The point is that the cards that you keep are a duplication of the base point information and the freight rate book information that you have.

A. If that makes the lowest delivered price?

Q. In all cases, yes.

A. Yes, sir.

Q. Yes.

A. Our competition is what the delivered price is and not what the mill price is, or where the freight is.

Trial Examiner Norwood: But the cards would
36372 not show you whether or not it is a regular price;

that is, a price made according to some formula or an arbitrary price, would it?

The Witness: It would show us what the delivered price was at that point; that is, the lowest price that we could determine.

Mr. Werle: Your Honor please—

By Mr. Paulson:

Q. Do you make those cards up?

Mr. Werle: —I think Your Honor misunderstood the witness, and I think that the witness misunderstood Your Honor.

The card does not show that.

Trial Examiner Norwood: I say, it would do it if there were an arbitrary at this point?

Mr. Werle: No, no, Your Honor, it does not. There isn't any information about freight rates or bases, or anything else, on those cards, just a price, that is all, and it does not indicate how it is made up.

Trial Examiner Norwood: Yes, but the card would be the key to the situation for him?

Mr. Paulson: Yes, that's right.

Trial Examiner Norwood: I was just thinking of the uses of the card.

Mr. Brick: Yes, that's right.

36373 Mr. Werle: That is true, the card is what he uses.

Trial Examiner Norwood: He can explain.

Mr. Brick: It is our point, as a key, he did not require any reference to the base, or the freight rate. That is the reason why the Government has objected to it.

Mr. Paulson: No, that is not the reason we have objected to that.

Trial Examiner Norwood: Go ahead.

(There were remarks made off the record.)

By Mr. Paulson:

Q. Do you publish prices to contractors, Mr. McGovern?

A. Do you mean send them quotations?

Q. Yes.

A. If they ask us for them; not as a general rule. We only send out quotations to the dealers.

Q. Is it generally the larger contractor who handles the more important jobs that gets the concession?

A. Well, I would say regardless of whether it is the

larger contractors, it is usually the larger jobs, regardless of whether it is the larger contractor; anyway, anyone that is able to bid on that type of work.

Q. Why don't you publish prices to contractors?

A. The only time—well, when a contractor asks for them, we do—but just to send quotations to contractors to points all over the territory, where he has no interest, we don't do it, it is just a waste,—a job coming
36374 up where he is interested, why, we do quote him prices.

Q. Well, don't contractors who have their own trucks ever ask to buy f.o.b. mill?

A. We have cases where the job is right close to Nashville where they figure they can save something, we have had them request that,—not recently, because there have been no jobs recently right around Nashville.

Q. How recently?

A. I don't believe that we have had a job that could be trucked economically in the last three or four years; I don't remember any right offhand.

Q. Did you grant the request for delivery f.o.b. mill that you did have?

A. If we have had one right recently we did not grant it.

Q. Well, do you recall any that you did grant?

A. Oh, we have granted—you mean, since we have been in existence?

Q. No.

A. Oh, we have granted numerous—

Q. No, you spoke of some contractor having requested delivery at the mill about three or four years ago. Do you have any particular instance in mind?

A. Is that the one where—is it—

Q. I don't have it in mind. Do you have any in mind?

36375 A. Yes, I have one in mind when I answered that question. It is a question in my mind as to whether it was a trucking proposition or towing proposition. It was a job that was from the river on—is that the one where I said the railroad published that cheaper rate in the tariff?

Q. Well, possibly that is what you have in mind. I still do not have one in mind.

A. Well, that's what I have in mind now. I said truck-

ing at that time, but that was a towing proposition, rather than a trucking proposition, and they were digging the sand and gravel right on the river on this job, and it was a question of trucking or towing it to this point.

Q. You did not allow them, or did allow them, which?

A. The railroad gave us a cheaper price than he could tow it, and he made that saving, and we showed it.

Q. How long did you permit trucking of cement from your mill?

A. From when we started in 1924 up until I think it was February, 1933, and we are still doing some now; but in February, 1933, we quit deducting the freight from the delivery point back to our mill.

Trial Examiner Norwood: In this instance where you consulted this Government purchaser there, that you testified to yesterday, do you remember that?

The Witness: Yes, sir.

Trial Examiner Norwood: You proposed that
36376 your company truck this cement from your mill to the point of use, and save some money.

The Witness: Save the Government some money.

Trial Examiner Norwood: Yes. Was the object of that conversation to get him to change the specifications?

The Witness: No, sir. The object of that conversation, I asked him if I attached a letter to my bid making him a price delivered by truck to this dam would it be considered.

Trial Examiner Norwood: Well, now, did the specifications require delivery by rail, or some other way than by truck?

The Witness: There was no rail there; it was to be delivered by boat.

Trial Examiner Norwood: The specifications required by boat?

The Witness: No, sir.

The specifications asked for a price f.o.b. the mill, or f.o.b. the incline to be put on the boat, and then they asked for a price from these people that were in position to load it on the boat, for a price unloaded from the car to their boat, and that was where the difference in that unloading price was.

Trial Examiner Norwood: I was trying to find out whether you could not utilize this advantage there,
36377 and make a lower bid to the Government there, or what was the reason you could not do that.

The Witness: Do you mean on the boat?

Trial Examiner Norwood: Utilize this truck advantage that you had there. Wouldn't he let you quote him, to deliver to the point of use by truck?

The Witness: No, sir; he said he could not consider that bid, because none of my competitors were in position to truck it.

Trial Examiner Norwood: Yes.

The Witness: In other words, it gave me a monopoly.

Trial Examiner Norwood: But the invitation wouldn't permit of you making a lower bid and utilizing that trucking on your own advantage?

The Witness: He said he couldn't accept it.

By Mr. Paulson:

Q. Mr. Harbison told you, as I understood it, that he had to ask for competitive bids for one thing.

A. He told me that he couldn't consider my letter attached to the bid because it gave me an advantage that the other manufacturers couldn't meet.

Q. I said he had not asked in his invitation for proposals such as you were submitting in your letter?

A. That's very true.

Q. And in order to receive your proposal he would have to re-write his invitation and make a new
36378 invitation inviting such proposals; isn't that true?

A. That's true, but it would have taken about five minutes, and he could have saved some money.

Q. But the point is the reason he rejected your offer was that he would have been violating the Government's instructions regarding asking for competitive bids?

A. It was my understanding that the Government likes to get the cheapest price regardless of how they get it.

Q. You think he was negligent in not re-writing his invitation?

A. No, sir; I think—

Q. You do not?

A. I think he said under the Government's ruling he couldn't do it, he couldn't accept my proposition.

Q. He could not, under the Government ruling, accept your proposition in view of the fact that he had invited bids in the manner in which he had invited them?

A. Yes, but if he had changed—

Q. But there was nothing to stop him from re-writing

his invitation and asking for such proposals as you offered?

Mr. Werle: Your Honor please, this is arguing with the witness.

Mr. Paulson: No.

Mr. Werle: Mr. Paulson is trying to argue him-
36379 self out of something here. If he wants to ask the witness factual questions about the witness' knowledge here, I have no objection to it.

Trial Examiner Norwood: The objection is overruled.

Mr. Paulson: I am asking him to—

Trial Examiner Norwood: I think that he might explain the situation here.

Mr. Werle: Oh, I am perfectly willing to have him explain it; but I do not see how the witness can possibly answer these questions, and it is purely argument.

Trial Examiner Norwood: I do not think so.

Have you finished your question?

Mr. Paulson: Yes.

Trial Examiner Norwood: Read the question.

(Last question read by Reporter.)

Trial Examiner Norwood: The objection is overruled.

Is that the fact?

The Witness: As to whether he could rewrite his invitation or not?

Trial Examiner Norwood: Yes.

The Witness: I don't know.

By Mr. Paulson:

Q. Well, I am trying to get at the subject, in substance, of a conversation you had with Mr. Harbison, as I under-
stand it, and I want you to tell me whether this is
36380 correct: Mr. Harbison refused your proposal, and stated to you his reasons therefor, and his reason was that the invitation he had sent out did not invite such proposals.

A. No, sir; that is not what he said to me.

Q. What did he say?

A. He said to me that if he accepted a price trucked from our mill to the dam that would put me in a position where my competitors could not meet—in others words, he could not accept my proposition because the near mill was over a hundred miles away, and they could not compete with me on trucking it to the dam.

Q. In other words, he thought—

A. He thought it would give me a monopoly, and that is what I was trying to get.

Q. Yes, but in other words, he told you that the invitation which he had issued was the only proper one that he could issue?

A. No.

Q. And that it did not allow for the reception of your proposal?

A. No, sir; he didn't tell me that.

Q. That is in effect what he told you?

A. That is a difference of opinion; that is not what he told me.

36382 Q. I think my last question was, what was the duration of your trucking?

A. From the time we started up to February, 1933, and we trucked some since that time. We have never discontinued it entirely.

Q. I think I asked you this, but I will ask you again: Your trucking today, or since February, 1933, has all been at delivered prices; that is, your prices to the trucker is the destination prices at the point to which he intends to haul cement?

A. That is true, with one or two minor exceptions:

Q. What are they?

A. Well, on one or two occasions, we did allow a dealer in an emergency to come to the mill and get a truck of cement and take off the freight, but that is an exception. It is practically all done delivered Nashville, and the delivered Nashville price has been used.

Q. Why did you adopt a policy which tended to 36383 restrict trucking, as you say?

A. Well, as I tried to explain, he bought his cement at the mill at a less price than anywhere between the point he came from and the mill. It enabled him to stock cement in towns where we have dealers, and it became such a nuisance that we were just forced to quit it.

Q. In other words, you are desirous of maintaining retail prices; is not that so?

A. The dealer has retail prices. We do not have them.

Q. You assist the dealer, so far as it is within your power to do so, to maintain retail prices?

A. Well, I would not say that, but when a man takes our cement in and takes business away from our estab-

lished dealer at a town, on account of the method we are using, then we do object to that.

Q. Well, is it not true that, so far as you can, you do assist your dealer in maintaining retail prices?

A. What we try to do is to do everything we can within reason to cooperate with our dealer, so that he will be satisfied to buy cement from us.

Q. I noticed one exhibit in the record—I think Mr. Werle showed it to you—where you wrote to the Marquette Cement Company and spoke about a 25-cent differential. Do you recall that?

A. Yes, sir. I said in my letter that a Nashville
36384 dealer asked me to write him. Yes, sir; I remember it.

Q. What did you say was your reason for writing the Marquette Company?

A. A Nashville dealer asked me to write him.

Q. And if you had quoted a 25-cent mark-up for your dealer, and Marquette had quoted a 20-cent mark-up, Marquette would get the business.

A. That is right.

Q. It is important, therefore, that you and your competitors observe the same mark-up when quoting dealers?

A. Well, you only have very, very few cases where you do quote for a dealer. Most of the dealers do their own quoting, and especially dealers in towns of any size.

Q. What occasion do you have to quote for a dealer?

A. On highway lettings, or on a job that comes up, if the job comes up in a town adjacent to Nashville, and some of the Nashville contractors asked us for a price, to bid on that job, we would find out from the dealer in that town what mark-up he wanted us to quote for his account, and we would quote that to the contractor.

Q. Do you frequently communicate with your competitors regarding information you receive from dealers as to their mark-up?

A. Very, very seldom.

Q. Why isn't it necessary to write more fre-
36385 quently, correspond with them more frequently?

A. Because our competitor keeps up with that pretty well himself. In other words, when he makes a quotation he is trying to find out, especially if he is selling cement in that area, what his dealer wants to mark-up, he quotes that for him.

Q. Do all dealers in a given area observe the same mark-up?

A. No, sir.

Q. Well, I would like to know your experience, then, whether it is not frequently necessary to check with your competitors as to the mark-ups they have word of from their dealers?

A. No, sir; not necessary at all.

Q. Now, you say that it is not a general rule that dealers observe the same mark-up; is that what you say?

A. No, sir; it is not, as a general rule; they all have—

Q. Well, isn't it—

Mr. Werle: Let the witness finish, please.

Trial Examiner Norwood: Let him finish.

A. As a general rule, they all have the same price in quoting, but not in selling.

By Mr. Paulson:

Q. Well, as I understand it from your testimony, your dealer in the Marquette situation, in the instance when you wrote to the Marquette Company there was going to quote 25 cents.

A. That is what they were trying to do, they 36386 were trying to get 25 cents' differential, and what they wanted me to do was to ask Marquette in case they did have a 25-cent mark-up would they protect them on any quotations they may have for their account.

Q. Do you know of any instances where you have quoted for your dealer a mark-up different from that which one of your competitors has quoted for his dealer?

A. Numerous occasions.

Q. In other words, you do not always have identical prices where you quote for dealers?

A. No, sir; especially back in the time when we were quoting highway paving projects, why, some of these country dealers would sell it for one or two cents. There was absolutely no mark-up that you could depend on.

Q. On what percent of your business do you quote for dealers?

A. Oh, I would not say, one percent, any more than that.

Q. What attempts have you made to eliminate quoting for dealers if you have made any?

A. Do you mean what attempts we make to—

Q. To eliminate that practice of quoting for dealers.

A. As I say, we only do that where we are called upon to do it, where it is a convenience to the contractor. In other words, it is more or less a service we try to render to him if he wants that service. He would rather we spend our money for long-distance telephoning than spend his own.

36387 Q. What is the average dealer mark-up in your territory, do you know?

A. That is hard to say, it varies so.

Q. Can you tell us, say in 1936 and 1937, what the mark-up was?

A. Well, I have known discounts—I mean, mark-ups—from a few cents to as much as 25 cents.

Q. On direct, I do not have the page, but some point in your direct you said you had found a mistake in rates in the Institute rate book when you had made no shipments to the point. Do you recall that?

A. Yes, sir.

Q. How did you happen to find a mistake in the rates in the Institute book when you had made no shipments?

A. Our traffic manager, in looking through the book, saw a rate that did not look right to him, and he checked it in the tariff, and it was not correct, so we notified the Institute that that rate was not correct, but we had no occasion to use it.

Q. I notice on page 36163 of the record, line 12, this question appears: "Can you tell me what the traffic manager checks the freight bill with when it comes back?" And on line 14 this answer appears: "The Institute freight rate books."

Do you recall that testimony?

A. Yes, sir.

36388 Q. Do I understand from that that you have testified that some one in your office checks every freight bill with the Institute freight rate book?

A. Yes, sir; whether they come back from the railroad on a prepay, or whether they come back where a customer has paid it for our account.

Q. Who in your office does that?

A. Mr. Robine, you will find his O. K. on that.

Q. Now, are you familiar with the method by which he checks those freight bills with the rate book, the Institute rate book?

A. Well, I would say yes, sir; I have checked quite a few of them myself.

Q. Well, I have here the Institute rate book for Tennessee, exhibit—Commission's Exhibit 1110-2-A, and I have here a freight bill that was put in evidence by Mr. Werle, Respondents' Exhibit 2660. I would like to have you tell me how you can check that rate with just that freight rate book.

Mr. Werle: Do they cover the same dates?

The Witness: This is not the freight rate book, I do not believe, that is in effect on this date.

By Mr. Paulson:

Q. Well, I have the correction sheets, too. I guess I do not have them down here.

Mr. MacIntyre: Mr. Paulson, that is the last 36389 freight rate book.

The Witness: The last one—oh, I beg your pardon. We have a green-covered one now we use. This is not the last one.

By Mr. Paulson:

Q. Well, the rate in there is 14 cents to that point, and the rate on the bill is 15, but the correction sheet, or the last Institute information on freight rate, is 15, I will grant you that.

A. Yes, sir.

Q. In other words, the Institute rate book shows a rate from Nashville to Dyersburg—

A. Yes, sir.

Q. —of 15 cents.

A. Yes, sir.

Q. I checked that and know that to be the case.

A. Yes, sir.

Q. Now, I am asking you is that all the check that you made to ascertain whether that freight bill is correct or not?

A. No, we multiply the 95,000 pounds by the 15 cents to see if the total is correct.

Q. Yes, I understand that, but is there any further check that you make to see whether or not that is the correct freight bill on that shipment.

A. Well, the first thing you have to see if your 36390 number of barrels multipled by 380 makes your

pounds, then your pounds plus your rate makes the total amount here; that is all there is to it.

Q. Now, I notice that there is routing information on this freight bill.

A. Yes, sir.

Q. Exhibit 2660.

A. Yes, sir.

Q. N. & C. to Martin.

A. Yes, sir; and from Martin to Dyersburg, I. C. That is junction point.

Q. And the 15-cent rate applies over that route?

A. Yes, sir.

Q. Do you know whether it applies over any other route?

A. The freight rates in our territory are all made on a mileage basis, and it depends on, if it is in that basis and within those limits, whether it applies or not. In other words, a rate of 15 cents, say, just for the sake of argument, will cover any route to that point up to, say, 300 miles. You can route it any way you want to. In fact, that is the shortest route from Nashville to Dyersburg, in my opinion.

Q. I notice in your bill of lading here, which is Respondents' Exhibit 2659, that you have the routing information, N. & C., Gibbs, I. C.

A. Yes, sir.

36391 Q. Where do you get that information to put on that bill of lading?

A. Where do we get that? We know that—just like I know my A, B, C's.

Q. Do you know the shortest or lowest route to every destination point in your sales territory?

A. I would say practically all of them, and if there is a doubt in our mind, as I say, we check the total mileage to see if it is too great, and that is the only time we check the routing, when, in our opinion, it is too great. In other words, we are not congested down in our area like you are up here. We don't have six or eight railroads to every town.

Q. How many railroads do you have serving Nashville?

A. Three.

Q. As I understand it, when you ship a car of cement, you call up a railroad and get the car sent up to your plant; is that correct?

A. Well, we keep cars out there all the time.
Q. Well, you keep cars out there.
A. That is right.
Q. If you loaded a car, say, for Dyersburg, which one of the three railroads would you route it over?
A. We have an agreement with the N. C. & St. L. that we will give them all the business we can unrouted, on account of a special rate they put in to our second
36392 quarry from Nashville, and Dyersburg being in the western end of the State, and being on the I. C. and the G. N. & M., they could only use those two; that is, in connection with the N. & C.-I. C., or the N. & C. & St. L. to Jackson, G. M. & N.

Mr. Werle: I think the record should show that the witness was not referring to any papers or documents when he made that statement.

By Mr. Paulson:

Q. Now, when you load the car, you say under a contract you deliver it to the N. & C.
A. Not under a contract—under an agreement we have with them.
Q. You deliver all your cars to the N. & C.
A. No, sir. What we have is an agreement with them that we will give them preference, providing the customer does not route it against him.
Q. Well, what other railroads run into Nashville?
A. The N. C. & St. L., L. & N., and T. G.
Q. The N. C. & St. L. is the originating carrier to certain destination points?
A. Well, it is very few points—
Q. Just a minute.
A. I beg your pardon,
Q. To certain destination points, and is the only
36393 originating carrier to those destination points that is a party to the lowest combination of rates; is not that true?
A. I don't understand your question.
Q. Well, I will try to frame it differently. In other words, to some destination points to which you ship, or, I should say, in shipping to some definition points to which you do ship, you must tender your car to the N. C. & St. L. rather than to the Louisville & Nashville?
A. There are very few points—

Q. Is not that true?

A. No, sir; there are very few points in our territory that we cannot ship by more than one route.

Q. Yes; but my point is that you cannot tender all of your shipments to the same originating carrier and secure to yourselves the lowest rates between your mill and the destination point.

A. Well, we know—

Q. Is not that true?

A. Well, I wouldn't say so; no, sir; because we know. We don't tender to the N. C. & St. L. a bill of lading that we know is a local station on the Louisville & Nashville Railroad or on the Tennessee Central Railroad.

Q. I am asking you now, is it not true that you must tender your shipments to one of the three railroads, rather than to the other two, in order to insure yourselves
36394 the lowest rate between your mill and the point to which you intend to ship? Is that not true?

A. I would say—

Q. I ask you if that is true.

A. No, sir; because it depends on whether it is in within the scale that that rate applies. You can send it all around Robin Hood's barn, if it does not exceed the maximum miles that the rate covers.

Q. Outside of the range or area which is covered by the maximum rate or the minimum rate, rather—

A. Maximum.

Q. Yes. There are some points to which you make shipments, and when you are making those shipments you must exercise a selection of railroads in order to insure yourselves of the lowest rates?

A. Oh, certainly. We couldn't ship a car out of Nashville to a local station 30 miles on the L. & N. Railroad, and give it to the N. & C. In other words, they wouldn't accept it.

Q. That is what I am trying to get at.

A. No; they wouldn't accept a car if they knew that they could not handle.

Q. In other words, you have to know which railroad to tender your shipments to whenever you ship cement.

A. Why, certainly. You cannot give it to a bus line. Certainly you would have to know.

36395 Q. You would have to know which one of the three railroads that serve Nashville to tender your car to?

A. That is right, but, as I say, there are few points; there are but two available routes——

Trial Examiner Norwood: Just answer the question.

The Witness: I cannot answer them, though, Your Honor.

Mr. Werle: I submit the witness is answering argumentative questions, and in order to answer them he has to argue. If Mr. Paulson will ask him a question so as to elicit a factual answer, I think we can get along a lot faster, and there will not be any need to censure the witness. This is argument. That is what it is.

Trial Examiner Norwood: I do not think so. It is legitimate cross-examination, and there is no reason for the witness to argue.

By Mr. Paulson:

Q. I notice that you put the routing instructions in that bill of lading, Respondents' Exhibit 2659, Mr. McGovern. Do you always put the routing information on them?

A. No, sir.

Q. Why did you put it on that one?

A. Evidently it was requested, or we knew that he was on the I. C. Railroad, and asked for I. C. delivery.

Q. In what percent of the cases do you put the 36396 routing information on your bill of lading?

A. I would say in by far the largest proportion, unless, as I say, it happens to be a local station on the line, where only one line could possibly handle it.

Q. In about 90 percent of the cases, or 95?

A. That we put the routing on?

Q. Yes.

A. No, I wouldn't say that, because I would say that probably 30 or 40 percent goes to local stations that only one line could handle.

Q. Well, where more than one line could handle it, do you always put the routing information on it?

A. Yes, sir; because it is asked for.

Q. By "usual," do you mean in 90 percent of the cases, or in what percentage of the cases?

A. I would like to understand what you mean by that. Do you mean 90 percent of the local points—90 percent of the two-line hauls?

Q. Yes; where there is a two-line haul, as in those two cases, in what percent of the occasions do you put it on?

A. Well, probably 85 or 90.

Q. That is what I am trying to get at. Where do you get the routing information?

A. Mr. Paulson, we know it. I can tell you practically every town in that territory, how we ship, from
36397 memory. We don't have any complications on that. You are just on the wrong road.

Q. Well, I am not on any road. You are anticipating something.

Trial Examiner Norwood: Just answer the questions.

Mr. Paulson: I am merely seeking information.

By Mr. Paulson:

Q. You say you ship without referring to any cards or any records, or anything on routing information?

A. No, sir. The only time we do is when request is made, where we have to check up to see if the rate applies within that mileage.

Q. What is the significance of your statement "applies within that mileage," in that answer, Mr. McGovern? You explained it a minute ago, but I did not get it.

A. The rates are made on a mileage basis, and they break within certain blocks, and, say, a rate of 15 cents will cover up to 300 miles; you can route that car over any route desired, as long as it does not exceed the 300 miles at that rate.

Q. Oh, I understand now what you are talking about, but so far as getting a car through in a hurry, in order to protect yourself and see to it that it does get
36398 through in the shortest possible time, you must designate the routing; isn't that true?

A. Yes, sir.

Q. And to insure that it goes on a railroad so as to be delivered at a desired point, such as a siding, you must put the routing on; does that sometimes happen?

A. No, sir.

Q. Well, when else is it desirable to put the routing information on,—what other circumstances?

A. Most of the time because our customer requests a certain route.

Q. Why does he request a certain route?

A. He wants to favor some railroad. They solicit business like we solicit orders.

Q. Well, do you have as great familiarity with the

rates and destinations you serve as you have with the routes?

A. No, sir.

Q. Why not?

A. Well, Mr. Paulson, I traveled that whole territory for a period of years. I know the railroads. I had traveled on them.

Q. You said that a blanket rate applies within 30 miles.

A. That is right. They break in blocks.

Q. What is that?

A. They break in blocks; in other words, up to 20 miles so much, up to 40 miles so much.

36399 Q. Well, if you know the route to every destination how is it that you do not know what block it is in and therefore know the rate to every destination?

A. You mean why I cannot carry all the rates in my mind?

Q. Well, yes, if you—I say, answer that question if you can, the one I put.

Trial Examiner Norwood: Read the question to him.

Mr. Paulson: Read the question.

The Witness: I cannot answer it as to why I can-
36400 not carry the rates in my mind; I cannot answer that.

By Mr. Paulson:

Q. Well, you can carry all the routes in your mind, I do not see that the routes, according to your testimony, are a bit more complicated than the rates. I am wondering why it is that you cannot carry the rate information—you can carry the route information in your mind and you cannot carry the rate information in your mind.

A. Didn't I say I traveled that territory for years and have ridden all the railroads? That is the way.

Q. You personally know all the routes. Does anybody else in your company know the routes?

A. Yes, sir. I do not even fool with that. Our traffic manager does that.

Q. Where does your traffic manager gain the information?

A. He worked for the railroads probably ten or twelve years. See, it is every-day business.

Q. So is the rates every-day business, isn't it?

A. Yes, but rates and routes are two different things.

Q. Well, do I understand you to say now that getting routing information is a simpler matter than getting the rate information?

A. Much simpler.

Q. How would you go about to find the rate, the lowest rate between your mill and, say, Chattanooga?

36401 A. Out of The Cement Institute book.

Q. No, no, I mean if you did not have that.

A. We would have to get it out of the tariff.

Q. And how would you find out the route which would give you the best service between you—

A. There is only one line that is direct, and that is the N. C. & St. L., 150 miles.

Q. Well, take a point served by two lines.

A. Well, Knoxville is a point served by two lines, either the N. C. & St. L. to Chattanooga, and the Southern up, or go Tennessee Central to Harriman, and the L. & N. from Harriman into Knoxville, or Southern to Knoxville from Emory Gap.

Q. Over which route would you send a shipment to get it there in the fastest possible time, to Parkside?

A. I do not know where it is.

Q. I thought you knew the routes to every one of your destinations.

A. I did not say I knew every country town in Tennessee.

Q. What route would you use to send it to Brotherton?

A. I do not know where it is.

Q. What route would you use to send it to Ensley?

A. I do not know where Ensley is.

Q. What route would you use to send it to Highland Junction?

A. I do not know where it is. If you will tell me between which points or cities it is I will be glad to tell you.

36402 Q. I cannot find that here.

A. See, this very stuff comes out of the tariff, some of them only have sidings.

Q. Which route would you use to get it to Louden?

A. Louden, Tenn., that is between Chattanooga and Knoxville on the Southern and should be routed via N. C. & St. L. to Chattanooga and Southern Railroad.

Q. How about McCloud, Tenn.?

A. I do not know where it is.

Q. What do you do when you have a shipment going

to McCloud so far as drawing up the bill of lading is concerned?

A. The first thing we do, we look in the official railroad guide and find out where it is located, on what line.

Q. You cannot get the information from the freight rate book?

A. No, there is no routing in the freight rate book. Before you determine how the shipment will move you have to find out where the place is.

Q. Having looked, having found out where the place is, having looked to the tariff to find the route, haven't you also found the rate?

A. I do not know whether the tariffs give the route or not.

Q. Answer that question, if you please.

36403 A. I say when we looked into the official guide to find out where it is located, not the tariff.

Q. Well, you know that it is located in Tennessee; what else do you look for in the official guide to find?

A. Where it is located; if we know where it is located we know the route to route it.

Q. That is, you know all the junction points, do you?

A. Oh, I would not say I know all the junction points; no, sir.

Q. You have to know all the junction points to be able to find the route, wouldn't you?

A. Well, there is a lot of little junction points for mine railroads up there; we never have occasion to use, so I do not know them all from memory. I know all the principal points.

Q. You know all the principal points, and you therefore know the routes of all your principal shipments; is that your testimony now?

A. No, sir; my testimony is that we know it to practically all the points where we make shipments.

Q. There are points to which you ship which you do not know?

A. If we have a shipment, certainly.

36404 Q. And you have to go to the railroad tariffs to find the lowest rate; is that correct, to find the lowest rate, is that correct, to find the proper route to select; is that correct?

A. I don't know.

A. We get the location out of the railroad guide, not the tariff.

Q. Well, the location will tell you the route, will it?
A. In ninety-nine times out of a hundred, it will; yes, sir.
Q. What is that other one, using your figure, using your last one instance.
A. That might be some little point we never heard of, it may be necessary where the rate was not carried in the Institute book to go back to the tariff to find it; some of the points are not listed in the freight rate Institute book.
Q. How will the information as to the location of the point tell you what the proper route is?
A. If it is located between two points, where we know what line that is on. If you said Louden, Tenn., a
36405 moment ago, I know that Louden is between Knoxville and Chattanooga, and you can take Sweet Water up there, any number of towns, Athens up there, if I know that I do not have to look anywhere.
Q. Now, showing you Respondents' Exhibit 2648, looking at this town, Winona.
A. Winona; yes, sir.
Q. You ship to that town?
A. Yes, sir; we have.
Q. What is the route?
A. N. C. to Memphis, I. C.; I. C. from Memphis; N. C.-I. C. to Winona.
Q Is that what you mean by locating it on the map?
A Yes, sir.
Q. You can then, with your knowledge of the railroad structure, in your territory, can tell—
A. We could ship it through Jackson.
Q. Yes, you could. Now, which route would you use, which is the fastest?
A. The chances are we would do better through Jackson than Memphis, but the rate applies both ways.
Q. I am not asking you as to how to protect yourself on the lowest rate, but the best service.
A. Well, the chances are it would be through Jackson.
Q. But you don't know for sure whether it is quicker to ship by way of Memphis to get to Winona or to
36406 ship from Jackson directly down through Memphis, through Chattanooga and into Winona?
A. If we did not—
Q. Do you know for sure?
A. If we did not get a routing request for routing—we would ship it through Jackson.

Q. And not ship it to Memphis at all?

A. That is right: If he asked—

Q. How do you know it would go faster by way of Jackson straight down through here, or faster that way than it would by going through to Memphis?

A. Well, when it stops at Jackson, Tenn., it is 150 miles from Nashville; and when it stops at Memphis it is about 235 miles, we naturally figure it would have to go right through there, and it being the smaller town it would be switched quicker than it would be at Memphis, which is a larger junction.

Q. Do you route your shipments on the theoretical information like that?

A. What do you mean by theoretical.

Q. Well, you do not know which is, as a matter of fact, the most direct route, do you?

A. You take 98 per cent of the time, that will be the quickest. Of course, if it broke down after it got some place else, and delayed, or went in the ditch, or something else, of course you cannot always be positive.

36407 Q. Now, then, Mr. McGovern, do you have your freight bills audited?

A. Only by our own traffic man.

Q. Does he check each freight bill with the railroad tariff?

A. Yes, sir.

Q. Does he do that once a year?

A. I say with the railroad tariff. He does with the Institute book. On our cement we do not check on that. Now, on other shipments, bags and supplies for the mill, he checks those in the tariff.

Q. You say there is no other check in your company except the rate—as to the rates—than a check with the freight rate books?

A. Unless we think there is a mistake and check it back to the tariff just to be positive.

Q. How long has that been your practice not to check other than the freight rate book?

A. I do not think we have checked the tariff since we got the freight rate books since we started getting them.

Q. When did you get these freight rate books?

A. It seems like to me about the first one the Institute issued, about 1930 or 1931, right along in there somewhere.

Q. And prior to that time, prior to the time you got the Institute freight rate book, did you check the freight bills with the tariffs?

36408 A. Our traffic manager,—see, up to 1930, we were down with T. L. Herbert & Sons, and the traffic manager down there did.

Q. What does the daily work of your traffic manager consist of?

A. He looks after the shipments or the routing, checking tariffs and orders; he and myself do it all. What I don't do, he does.

Q. Do you suppose in the course of a year you check and ascertain the applicable freight rate between your mill and every destination point to which you ship cement?

A. You mean do we check them regularly?

Q. In the course of a year, I say, do you think—

A. Well, the great percent of our shipments go to the same destinations over and over and over. Our traffic man knows quite a good many of those rates by heart.

Q. Well, as to those that he does not know by heart.

A. He would get out the Institute freight rate book.

Q. You said that, and I say do you also, in the course of a year, check that rate out of the official tariffs?

A. No, sir; we never check the official tariffs

36409 in connection with the freight rate book unless in our estimation the freight rate book is wrong.

Q. How would you ever estimate that the freight rate book is wrong?

A. Well, you look through there and if you find the point where in your mind the rate is too high, that it does not break within the block, and we have had some revisions of those right recently, then when there is a question we look at the tariff to be sure.

Q. Well, do you know the rates so well that you can, by looking at the rates in the Institute book tell whether they are right or wrong?

A. No, sir; but every now and then you get the idea one does not look right, you can check it to find out.

Q. Well, it is a simple matter to get rate information down in your sales territory, then, is it?

A. Do you mean from the railroad or the tariffs or the freight rate book?

Q. I mean—well, can you answer the question as it stands?

A. No, sir; because I do not know what you mean by it.

Q. Well, ascertaining rates in your sales territory, as between your mill and the points to which you ship, is not a difficult matter?

A. Well, it takes quite a good bit of time if you dug out each one because you have to look at the tariff.

36410 and you have to look at the tariff and you have to look at the supplements to the tariff to see if there has been any change. Then it takes a little time because three or four supplements are usually—

Q. How long do you suppose it would take you to satisfy yourself as to all the rates that apply by looking at the tariff?

A. I do not know. I could not tell you. It has been so long since I fooled with the tariffs I could not tell you.

Q. Do you have any idea how long it would take you to build up a card index, say, of rates, to ship from Nashville, that you need for shipping purposes?

A. How long it would take?

Q. Yes.

A. No, sir; I do not know.

Q. Do you think an expert traffic man could do it in 10 days of steady work?

A. From Nashville to every point we ship?

Q. Yes.

A. Within a year?

Q. Just the rates you need for shipping purposes.

A. Well, you mean rates for shipping purposes other than the points that you actually ship, because your whole territory is a potential market, and you would be constantly digging them—

Q. I will separate it. I want to ask you first how long it would take you to dig out the rates that you ne d

36411 solely for shipping purposes.

A. I don't know. I couldn't tell you, because, as I say, the tariffs are all new since I fooled with them, and I don't know what a difficult problem it is, or how many tariffs are involved right now.

Q. Well, about how many different destinations do you ship to in a week?

A. In a week?

Q. Yes.

A. Oh, I guess there have been times when we probably ship to a hundred; maybe more.

Q. Could you find a hundred rates in that territory today?

A. At the present time I doubt very seriously if I could find any of them by myself, because I am not familiar with—

Q. Could an expert traffic man do it?

A. Well, as I say, by the time he looked them up and then went through supplements—it depends on how many supplements were in effect—it might take 10 minutes or 15 minutes, or it may take him 5 minutes. I don't know. I am not qualified as a rate expert.

Q. How much time and effort does he give to checking rates each day, now, with this freight rate book; do you know?

A. He would only check very few, and that would be shipments other than cement.

Q. Mr. McGovern, do you recall Commission's 36412 Exhibit 547-4-J? That was the summary of the explanation of the dealer policy regarding sales to State Governments. Do you recall that?

Mr. Werlé: Wait a minute, now.

If Your Honor please, I do not know of any summary of any dealer policy. If we are going to talk about exhibits, let us talk about them correctly, and show them to the witness.

By Mr. Paulson:

Q. Do you recall this Exhibit 547-4-J (handing exhibit to the witness)?

A. Yes, sir.

Q. Now, you told us on direct examination that several of those that attended the meeting at which that document was brought out—where was that meeting held?

A. At Knoxville.

Q. You said several of those who attended the Institute meeting stayed and participated in the preparation of that document; is that correct?

A. After the Institute meeting was over, somebody sat down and wrote this out. I don't know how much—

Q. Who write it out?

A. I have tried to search my memory, and it was either Frank Conklin or Fred Parsons, but I am not positive which.

Q. Parsons is of the Volunteer Company?

A. Yes.

36413 Q. And Conklin?

A. He was with Signal Mountain at that time.

Q. Who else were there?

A. Well, it is terribly hard for me to state. I remember that there were few there. How few, I couldn't say. How many had left I couldn't say. I do remember that Mr. Monday was there; I remember Mr. Dalby was there. If I remember correctly John Bowen was there, Frank Conklin, Fred Parsons, Milton Danlley—

Q. With that company was he connected?

A. National Cement Company, Birmingham. Beyond that I just don't remember.

Q. Who presided?

A. Well, it was not any meeting at all. It was after the Institute meeting was over. It was just a general discussion. Nobody presided at all.

Q. Exhibit 547-4-D to 4-I was shown to you by Mr. Werle; is that right, and you received a copy of that, you said, from Mr. Baker? Do you recall that?

A. Yes, sir.

Q. Do you know who prepared the copy that Mr. Baker gave to you?

A. No, sir; I do not.

Q. Did Mr. Baker tell you anything about it when he handed it to you?

36414 A. No, sir. As I remember, I asked him to give me a copy of it, and he gave it to me.

Q. Give us a little more of the surroundings about that, will you?

A. As I remember it, it was during a highway letting in Nashville, that I told him I had seen a copy of it, and I would like to have a copy of it.

Q. You had seen a copy of it?

A. Yes, sir; his salesman had a copy of it. That was the first one I saw, and I told him I would like to have a copy of it, and, as I remember, he either gave it to me at that time or mailed it to me. I am not positive.

Q. What else was said?

A. I don't remember that anything else was said.

Q. Did you talk with his salesman about that, the salesman who had it when you first saw it?

A. The only thing I remember, he said to me, "Have you seen a copy of it?" and he showed it to me, and I said,

"No; that is the first one I have ever seen." So he said the office had sent it to him, and I casually looked it over, and it looked like a very complete interpretation of our policy, and I asked Mr. Baker if he could give me a copy.

Q. Following the elimination of Article XI of the Code, did you have a clearly-defined dealer policy?

A. Well, I would say that it was more or less of a
36415 principal policy, as I tried to explain before.

Q. It was probably more flexible than that, in your experience, than had been the case for several years prior?

A. No, sir; I wouldn't say that. What I meant by "flexible" was in a town of any size, what you consider a building supply dealer there would not apply to a small town, where there would be probably one customer selling cement. We have one drug store that buys cement from us.

Q. You say the policy was somewhat flexible after Article XI was eliminated from the Code; is that correct?

A. I say it was not any more flexible at that time than it had been before.

Q. Was it because your policy was flexible that you were interested in this Exhibit 547-4-D to 4-I?

A. I don't exactly get the connection.

Q. Have you issued dealer policies from time to time?

A. As I remember it, we issued two policies to our dealers.

Q. Why did you not issue one after Article XI was taken out of the Code?

A. Well, I did not know that there was any occasion at that time to issue one. That was during the Code period, when everything was set out, what we could do and could not do, by law.

Q. You said on direct examination that it had been your practice to sell just as described in this exhibit.
36416 Now, a description of how to sell certain business is contained in that schedule, which you had never sold before 1935; is there not, Mr. McGovern?

A. I don't just understand what it is you want, Mr. Paulson.

Mr. Paulson: Well, I will try to make it a little more clear. Along about 1935, the Government began making purchases of cement, and there were problems for you to

decide which you had not theretofore had; is not
36417 that true?

The Witness: Do you mean W.P.A. purchases?

By Mr. Paulson:

Q. Yes.

A. Well, that is true, I would say, to this extent; but, in our opinion, that was dealer business, and we so quoted it. In other words, we did not quote—

Q. You could not have had an established policy as to any of those types of work there?

A. Well, that is the only one that I can think of, in here right now, that came up at that time. The others, more or less. Now, there might be some specific types in here that we did not have to contend with in our territory.

Q. Did you find considerable variance after Article XI was eliminated from the Code in the policies of your competitors with regard to sales to dealers?

A. No, sir; I don't remember any.

Q. Was it not—

A. I say, I don't remember any. I just don't recollect right now.

Q. You were the only one that had a flexible policy?

A. I was the only one?

Q. Yes.

A. No, sir; I think practically all of them had flexible policies.

36418 Q. Well, when Article XI was eliminated, was there a fixed, ascertainable, and known plan of selling through dealers on the part of you and your competitors?

A. Well, I didn't know that there was any fixed plan. As I remember, I don't know that there was any variance any more than we usually have. Now, there might have been a little more or less. I don't remember just distinctly, and I don't remember any terrible change in conditions. As I say, there might have been. We have those things coming up from time to time, but I don't remember of any specially bad conditions at that time.

Q. I think there have been one or two witnesses on the stand, and if you have read the record you know that they said that there was a state of flux existing after the N.R.A. Article XI was eliminated.

A. Well, that—

Q. Would you say that that was true in your section of the country?

A. Well, as I say, it might have been a little more so in that direction, but I wouldn't say it was just chaos. I don't remember any condition like that.

Q. No; but, ordinarily, there is no indecision or indefiniteness in your mind as to how to sell cement, whether to sell it through a dealer or not; is not that true?

A. Yes; I would say that is more or less correct.

36419 Q. But after Article XI was eliminated from the Code, and the Government had assumed the role of a major purchaser, you did have indefiniteness and indecision in the matter of whether to sell direct, and how to sell certain jobs; is not that true?

A. Well, being a small company, and not making any policies, what we do is to follow along in line.

Q. Well, there was nothing to follow after Article XI was eliminated; was there?

A. Yes; we always have our competitors.

Q. What did you follow after Article XI?

A. We followed our own policy, but we followed our competitors in regard to sales.

Q. What policy do you have in mind that you followed, what competitors' policy do you have in mind that you followed after Article XI was eliminated from the Code?

A. I don't have any in mind.

Q. Who had announcements?

A. Oh, the first policy that was announced, as I remember it, was Lehigh.

Q. In February of 1935, was it not?

A. That is my recollection.

Q. Article XI went out in January, 1934, and you had a year there.

A. Yes, sir.

Q. When you had no policy announced by any company.

36420 A. Well, we have a policy, whether any company announces it or not.

Q. What I want to know is, in that year, was there a situation in regard to sales through dealers or direct, that was indecisive and less ascertainable than normally?

A. I don't remember distinctly just that exact period, and I have no recollection whether there was a terrible lot of difference at that time.

Q. It does not stand out in your mind?

A. No, sir; it does not.

Q. Does any period stand out in your mind, when there was not a definite and known manner of selling cement, from the standpoint of whether it should be sold through dealers or direct?

A. Do you mean definite as far as we are concerned, or definite as far as what somebody else was going to do?

Q. Well, the answer would be the same. You said you were price followers, and you followed the general tide, the movement of the tide.

A. Yes, sir; but you never know what that is until it happens.

Q. Do you mean to say now there is nothing definite in cement marketing with regard to sales direct and sales to dealers?

A. Yes, sir; but they are always subject to change. When I started in the cement business, practically all of our business was sold through dealers. It has been gradually getting away from that. There have been more direct sales.

36421 Q. Does it break up by the day or the week or—

A. No; there has been 24 years, in my experience.

Q. In your 24 years there have been but three major changes in policy?

A. No; I would say a good many more than that.

Q. In your territory.

A. Yes, sir.

Q. Did you give a copy of this Exhibit 547-4-D to 4-I to each of your salesmen, did you say?

A. Yes, sir.

Q. Did you have it mimeographed?

A. No; it was copied on a typewriter. We don't even have a mimeograph.

Q. Did they use it?

A. Well, I imagine so. I sent it to them, and I told them I thought it was a clear interpretation of our policy. Now, what they did beyond that, I don't know.

Q. Have you made any changes in that policy since?

A. The only one is the sale of grade and drainage and small bridge structures direct.

Q. Did you lead off with that change?

A. No, sir.

Q. Who did?

A. My recollection is that at this discussion somebody asked one of the members there—I have forgotten
36422 just exactly who it was; I believe it was Lone Star—if they had changed their policy, and they said no. "Well," they said, "here is a grading and drainage structure that you sold direct, and we are wondering if you changed your policy," and I think that is what brought on the discussion regarding grading and drainage projects.

Q. And after that discussion you changed your policy?

A. I changed mine before I went to that meeting.

Q. You had already had knowledge of the fact that the Lone Star had—

A. Yes, sir; I had already made up my decision of what we were going to do.

Q. What is the lowest mill net you will accept today?

A. Oh, we don't have any dead line to which we will go. It just depends on how bad we need business and how low the net is and the conditions surrounding it.

Q. What is the lowest mill net that you received in the last four years?

A. I couldn't tell you offhand.

Q. What is it, approximately?

A. In four years?

Q. In the last four years.

Mr. Werle: I object to that.

A. I don't know.

36423 By Mr. Paulson:

Q. What is the range of the mill nets you received in 1937, Mr. McGovern?

Mr. Werle: Your Honor please, that is the same question I objected to before the recess.

Trial Examiner Norwood: I do not think there is anything on the direct. I do not just recall. If the Counsel will call my attention to it—

Mr. Paulson: Well, this map, Respondents' Ex-
36424 hibit 2648, is on that map. It shows the territory in which this company sells its cements, and freight absorptions, and now we are attempting to find out what degree of the freight absorption is, see, in order to further explain, further understand this map, understand what this means. He sells away down here in Mississippi, and up around his own mill.

Mr. Werle: There are no freight rates shown on that.

Mr. Paulson: If this map is admissible, certainly a question regarding mill nets he receives is admissible.

Trial Examiner Norwood: Well, I shall not receive any of that to have any bearing on what the costs are or profits.

Mr. Paulson: It would not.

Trial Examiner Norwood: With that understanding, I will overrule the objection.

36427 By Mr. Paulson:

Q. What is the range of your mill net?

A. Did you say in 1937?

Q. Well, I said that—if you can answer that, I wish you would.

Trial Examiner Norwood: I thought he said that he cannot give them.

A. I cannot give them accurately.

By Mr. Paulson:

Q. No. Well, did you receive a mill net as low as 90 cents?

36428 A. No, sir. I would say it has been many and many a day since our net was that low.

Q. What is it?

A. I would probably—the lowest net we received in 1927 was around—

Q. 1937.

A. 1937, was around $1.30, in that neighborhood.

Q. And what is the highest?

A. Our highest mill net is at Nashville, which is about a little over $2.

Q. In other words, you operate on mill nets ranging between $1.30 and $2?

A. Probably a little better than $2.

36432 Q. You have said, Mr. McGovern, that you keep price cards on which you show destination prices. Do you also keep cards in your rate department showing freight rates?

A. No, sir; only the Institute freight rates, we do not keep any cards.

36433 Q. You do not?

A. No, sir.

Q. Do you ever have occasion to collect overcharges from the railroads for cement shipments?

A. Yes, sir. What we do if we ship a customer and there is an overcharge, he sends the freight bill to us and deducts it from the invoice. We file the claim with the railroad and get the overcharge back. If there is an undercharge we would have to pay the difference.

Q. Does it frequently happen that they overcharge you?

A. Well, occasionally. I would not say frequently.

Q. How many destination points do you ship, do you know?

A. I do not know; no, sir.

Q. Approximately?

A. Well, I would say three or four hundred, guessing.

Q. Do you think that is all the destination points you ship to, three or four hundred?

A. I do not know, Mr. Paulson. I have never had an opportunity to count them or estimate them, just grabbing a figure out of the air. I do not know.

Q. Did you see your freight rate expert check this freight bill, Respondents' Exhibit 2660?

A. Did I see him, personally?

Q. Yes.

A. No, sir.

36434 Do you know, then, from your own observation that he used the Institute book to check it?

A. I asked him about it, and he said he always did.

Q. He told you that he did?

A. Yes, sir.

Q. Did you ever ask him whether he ever checked these freight bills with any other information?

A. No, sir; the only thing I asked him was if he checked the freight rate bills with the Institute books, and he said he did.

Q. But you did not ask him whether he checked them with the tariffs or not?

A. No, he does not.

Q. You did not ask him that?

A. No, because I have seen him check so many, and when he is away I check them, and we always check them from the Institute freight rate books.

Q. Do you have the same office as your traffic man?

A. No, sir; just adjoining.

Q. Do you know, or can you testify of your knowledge, that he does not check these freight rate bills with tariffs occasionally?

A. I can testify that I have seen him check them out of the freight rate books. I don't say he never checked one out of a tariff, but all the times that I ever saw
36435 him check, and there was considerable, I have seen him check out of the freight rate book.

Q. But do you know of your own knowledge that he does not also check the freight bill with the railroad tariff, or whether he does not check the Institute rates with the railroad tariff?

A. All I know is what I saw him do, and what he has told me.

Q. But you do not know positively?

A. No, sir; I don't sit there and watch him all day.

Redirect Examination by Mr. Werle.

Q. Mr. McGovern, did you say that you check some of these freight bills yourself?

A. Yes, sir.

Q. Do you know what the regular routine of your business is in that respect, how it is done as a regular part of your business?

A. Yes, sir.

Q. What is the regular course of your business with respect to checking these freight bills?

A. When these freight bills come back from either a customer or from the railroad, Mr. Robyn checks
36436 them with the Institute freight rate book.

Q. Now, let me ask you whether it is necessary for you to put the routing information on your bill of lading?

A. No, sir; it is not necessary.

Q. Do the railroads accept bill of lading shipment without routing information?

A. Yes, sir.

Q. Is it necessary for you to put a freight rate on your bill of lading?

A. No, sir.

Q. Will a railroad accept a shipment without any rate shown on it?

A. Yes, sir.

Q. Mr. Paulson asked you about how long it would take you to compile the freight rate information which you need at the present time, and I think you said that you

were not very familiar with the tariffs at the present time, and could not estimate it; is that correct?

A. That is correct; yes, sir.

Q. I understood you to say on direct examination, however, that you prepared these two freight books that we offered in evidence, of your company, Respondents' Exhibits 2656 and 2657; is that correct?

A. Yes, sir.

Q. Do you know how long it took you to compile those?

36437 A. Oh, I would say the better part of five or six months.

Q. Do you have any reason to believe that it would take you any less time at the present time to prepare this?

A. No, sir; as I say, I am not familiar with the present-day tariffs, but I would not think it would.

Q. Now, Mr. Paulson was interested in your ability to carry routing information in your mind and not rate information. Can you explain to us briefly why that is?

A. Well, the rate information is so changeable, and there are so many points on different railroads in that section; the only thing is they abandon some of them; they do not have any additions down there, and after you once know the territory, after you come in contact with it and travel it and know it, there is no secret as to routes.

Q. Does the railroad tariff, when you look into it, or when you examine it to find out the method of routing a shipment, tell you how long it is going to take your shipment to get to a destination?

A. No, sir.

36438 Q. Now, when you said that you followed the policies of your competitors after the N.R.A. period, even though there had been no announced policies for perhaps a period of a year, will you explain to me how you were able to follow and find out what your competitors' policies were?

A. The only way we could do it, of course, was in the field, find out what they were doing in different parts of our territory.

Q. And were they selling cement in different places in your territory during that period?

A. Constantly.

Q. And you were able to find out how they were selling it?

A. We keep up pretty well with what the conditions are in our territory.

Q. Mr. Paulson asked you a question as to whether or not the pricing methods of the cement industry are the same now as they were in 1916. Did you mean your answer to include all of the cement companies in the United States?

36439 A. I certainly did not.

Q. What did you have in mind when you answered that question?

A. Well, the only thing I had in mind was because when I first went into the cement business, I traveled Florida, which was a very small part of the Southeastern States, and what people did down there as compared to what happened in the other part of the territory, I was not familiar with.

Q. With respect to this list of basing points, Commission's Exhibit 831-X and Y, which Mr. Paulson called your attention to, can you tell me whether or not at that time you had in your office your own list of basing points?

A. Yes, sir; we did.

Q. And from what information was that compiled?

A. From information picked up in the field from time to time.

Q. Now, when you had occasion to use a list for quoting prices, which list would you use?

A. Practically all the prices are made up by our traffic man and he used the lists that I gave him, not the lists that I produced.

Q. Did you sell some cement to the T.V.A., Mr. McGovern?

A. Yes, sir.

Q. In that connection, can you tell me whether

36440 or not the nets that you have been receiving on T.V.A. shipments have been higher or lower or the same as your nets on your normal commercial business?

A. A good deal less.

Q. Did your company manufacture type B cement prior to the T.V.A. invitations?

A. No, sir.

Mr. Werle: That is all.

Recross Examination by Mr. Paulson.

Q. Mr. McGovern, I find it necessary to ask you one or two more questions:

How many freight rate books do you use in the conduct of your business?

A. Well, we have six salesmen, and each one has a book in the territory he travels in.

Q. In what different States?

A. Well, Mississippi, Tennessee, Kentucky, Georgia, Alabama, North and South Carolina, and we have probably Indiana, Louisiana, and I think probably Virginia.

Q. But you use all those freight rate books of the Institute?

A. No, sir; because we don't do any shipping into Louisiana, Illinois, or Virginia, but we do have copies of those books.

Q. How many supplements are there to the last 36441 Tennessee book which you use?

A. I don't recall any supplements. There are constant changes. We get page changes to change certain rates.

Q. About how many correction sheets have you received for that Tennessee book?

A. I don't know. I didn't pay any attention to it. The girl in the office puts the corrections in.

Q. You have seen your freight man check freight bills. How many bills have you seen him use?

A. How many times have I seen him check a freight bill?

Q. No; how many correction sheets have you seen him use?

A. As soon as correction sheets come in, as far as they are applicable, the freight rate is changed in the rate book; we do not keep the supplements. We change them in the book.

Q. You change them?

A. In the book; yes, sir.

Q. That would mean that the book you are now using for Tennessee does not have any of the rates that are printed in the book at all; would it?

A. No, sir. If I am not mistaken, there was a new book issued for Tennessee just recently, after all these recent changes, and it had all the changes in it.

Q. Just before that book came out, your book must have been such that every figure was changed in it?

A. No, sir; I would not say every one.

36442 Q. Well, there was an emergency charge that went in in 1937 that caused the freight rate to be changed.

A. Well, we didn't go through the whole book and change the book on an emergency, because we knew what that emergency was. It was 10 percent up to one cent, and that was the maximum, so that in figuring the rate of 13 cents you took 10 percent of it, and that would be more than one cent, and we just made it 14 cents; so we didn't change those.

Q. Do you do any freight rate work for your company?

A. No, sir.

Q. How long has it been since you did any freight rate work for your company?

A. Why, a couple of weeks ago, Robyn was away on just a few weeks' vacation, and I did some freight rate checking to see whether the right amount was assessed; but I do not do it as a general rule, because he is there practically all the time.

Q. With those one or two exceptions of two or three weeks ago, how much freight rate have you done?

A. Very little.

Q. Well, do you feel that you are in possession of all the knowledge that Mr. Robyn has with regard to rate work that your company does?

A. You mean do I know much about it as he does? Was that the question?

Q. Well, I will ask you that question?

36443 A. No, sir. He worked in the freight rate department for the N. C. & St. L. Railroad for years, and he is a real expert on rates. I am not—don't profess to be.

Q. Are you positive that you know exactly what rate work he does and how he does it?

A. Well, from sitting in the adjoining office about 95 percent of the time, I know pretty well what he does.

Q. That does not quite answer it.

A. Well, of course, I could not, under oath, state that I know every move that Mr. Robyn makes during the time that he is in the office. That would be impossible.

Q. Have you read the testimony of other witnesses in this record?

A. I have read every line of it since the date it was started.

Mr. Paulson: In view of the fact, Your Honor, that this witness is not the best source of information regarding his company's rate work, I move to strike the testimony with regard to freight rates, and if Respondents wish to have testimony in this record regarding the methods used by this company in making rates and checking freight rate bills, let us have the freight rate expert on it and find out. We cannot properly cross-examine to ascertain the true facts and that is what we are interested in.

36444 Trial Examiner Norwood: He has given you his observations on it. I think it is very clear on the record what he knows about it and what he does not know. The motion is denied.

B. A. MacDONALD, called as a witness for the Peti-
36445 tioner, and being first duly sworn, testified as follows:

Direct Examination by Mr. Seeley.

I am B. A. MacDonald. I am associated with the Northwestern States Portland Cement Company and
36446 have been with that company for 21 years. I am vice president, and have held that position since 1934. Prior to my election as vice president I was five years under the title of assistant to the president, with the same duties that I now have, and prior to that I was sales manager for ten years. I first came to the company February 1, 1919. Prior to February 1, 1919 I was with the Marquette Cement Company for nine years as a stenographer, rate clerk, sales manager. Prior to my connection with Marquette I was with the Northwestern Railroad for about ten years. During the time I was sales
36447 manager I had general supervision over traffic matters for quite a long time.

I am in charge of the marketing matters and policies of Northwestern States and determine the policies of the company. I am in charge of the plant and the credit department, and I am a director of the company.

36449 Northwestern States has a cement plant at Mason City, Iowa. It started operation in 1908. At that

36450 time its capacity was approximately a million bar-
36451 rels. I would say that, as a single manufacturing unit, that was considered a rather large plant. The present capacity at Mason City, on the present fuel, I would say is about 2,100,000 barrels. I base or estimate that capacity of the plant from experiences. I do not recall the exact figures but the largest amount of cement that has been produced at that plant in one year is something over two million and a quarter. I recall reporting its capacity as 2,500,000 barrels. In my judgment Northwestern States' plant at Mason City can produce that much cement annually today if we were back on the same type of fuel that we were then. Northwestern States
36452 figures its capacity by its experience, by what it has done. We make calculations by what we have done in the past.

36452 Q. In estimating your capacity, have you ever used any so-called three largest months of production formula?

Since I have been with the company the productive capacity of the mill has not been increased on basic manufacturing units, but by more efficient methods. One of these more efficient methods was the installation of Northwestern States' waste heat plant; that was the principal one. Northwestern States has not added any kiln capacity; it has twelve kilns. The storage capacity of its cement plant at Mason City is approximately 700,000 bar-
36454 rels of finished cement. Since the plant was built the storage capacity was increased to the extent of about 300,000 barrels to enable Northwestern States to run at full capacity during the wintertime when its shipments were low so it would have storage to store its manufactured product. The shipping season, depends on the weather, (but it is) from May 1st to November 15th; November 1st, sometimes. I determine the rate of operations of the plant.

Q. Do you use any capacity figures in your operations?

A. No, sir.

Q. How do you determine at what rate you will operate?

A. On the basis of our current demand.

Q. Are you guided by your storage capacity?

A. At certain periods of the year; yes, sir.

Q. Have you ever adjusted your rate of operations to any set percentage of your capacity as you have estimated?

A. No, sir.

Trial Examiner Norwood: What do you adjust it to?

The Witness: Our operations, sir?

Trial Examiner Norwood: Yes.

The Witness: To our current and prospective demands from the trade.

36455 We have our salesmen make weekly reports to our office as to how they found conditions in the field, and the state of our orders on our books. When we are operating we run from eight to twelve kilns. We have a regular period of shutdown. Since we have been burning gas it has been practically the same period because of the fact we can't get gas at certain months of the year. The reason for the shutdown is not entirely inability to get gas. We could substitute coal. If we have sufficient business to warrant operations, approximately two weeks would be the shortest possible shutdown that we could use, but when we have no heavy demand and no prospective heavy demand that warrants us to manufacture a load of cement ahead of time, we usually shut down about two and a half months. We regulate our pro-

36456 duction according to the demand that we feel is going to be in front of us. We have made a few attempts not a great many to try to reach out and get the volume to operate at volume capacity.

The witness identified Resp. Ex. 2711 as a statement showing the total number of barrels furnished by months, from 1927 to 1937, and Northwestern States' estimate of the productive capacity that it manufactured during

36457 those months. That was taken from a current record kept on his desk in a book, and he can vouch for its accuracy.

36457 *Examination on Voir Dire by Mr. MacIntyre.*

Q. Mr. MacDonald, where on this document, Respondents' Exhibit, for identification, No. 2711, appears your estimate?

A. Right here (indicating).

Q. That is in a matter of percentage?

A. Yes, sir.

Q. For what month?

A. For the year; for the year.

Q. The figures in the columns above that are the actual production?

A. Yes, sir.

36458 Q. And the estimates made up afterwards or before?

A. The only estimate on here is our percent of capacity. Those are actual production figures.

Q. That you would operate?

A. That figure—for instance, here, in 1927, we made 1,957,000 barrels. We estimated that that production was 78 percent of our production capacity.

Q. When did you arrive at that estimated figure of 78 percent? Was it before or after the production of 1,900,000?

A. After.

Q. After?

A. Yes.

Q. It was not an estimate of production, then; it was an estimate of production capacity used; is that correct?

A. That is correct.

Q. And from what records did this data come that is on this document?

A. That tabulation is a copy, Mr. MacIntyre, of figures that are put on my desk monthly.

Q. By whom?

A. The figures are prepared by the secretary of our company, and copied off a book I keep on my desk.

Q. From invoices, and the like?

A. No, sir.

Q. Where does he get the information?

36459 A. Mill records. Invoices had nothing to do with this. This is production.

Q. And do you report your finishing of cement to the Bureau of Mines by the month?

A. I believe we do; yes, sir.

Q. That is, these figures would have been reported to the Bureau of Mines over that period by the month?

A. I believe so.

Q. And when was this document prepared?

A. Two or three weeks ago.

Q. For use in this case?

A. I prepared it at the request of our attorney.

Q. For use in the case?

A. Well, those figures, you understand, Mr. MacIntyre—

Q. I am talking about the document.

A. That particular document, the figures from which that was taken are current records kept since 1908.

Q. I am talking about the document.

A. The particular document was prepared about two or three weeks ago.

Mr. MacIntyre: Your Honor please, we have no objection to the receipt of the document in evidence provided that this company, through its representative now on the stand, and its counsel, will waive any restraint that they consider or the Bureau of Mines considers that they
36460 are placed upon the Bureau of Mines towards the releasing of what the witness has told me are the identical figures as reported to the Bureau of Mines over these past 13 years, so that we may go up the street five or six blocks and check it without going to any expense to do so.

Mr. Brick: The witness stated that they are the same.

Mr. MacIntyre: If they are we should be permitted to check them by going five blocks to do so.

Trial Examiner Norwood: Yes.

Mr. Seeley: I beg your pardon.

Trial Examiner Norwood: Go ahead.

Mr. Seeley: I think, Your Honor, if we are talking about the basic data, the basic data is not at the Bureau of Mines.

Mr. MacIntyre: We are not after basic data. The only thing we want, what the witness has testified to, will correspond with this, and if permitted to examine it we have no objection to the document.

Mr. Seeley: The witness may have made reports to ten or fifteen other agencies. Are you going around to the other agencies?

Mr. MacIntyre: We are only asking for one.

Mr. Seeley: I do not see how that helps any,
36461 Your Honor.

Trial Examiner Norwood: Is there any objection to your making a condition of release of matter here so that those figures might be compared?

Mr. Brick: Yes, we do.

Trial Examiner Norwood: What objection is there?

Mr. Brick: We object to the request that has been made. I think it is a fact that Counsel for the Commission have the shipment figures on these matters which they discussed from time to time, and they do not require any further

figures. Now, if they want figures other than shipment figures, let them make an appropriate request for it.

Mr. MacIntyre: We are not asking for any others.

Trial Examiner Norwood: Do you think they have in their possession data from which the accuracy of this may be checked,—this tabulation?

Mr. Brick: No, but they cannot get that from the Bureau of Mines', either.

As I understand from the witness' testimony, if he has sent shipment figures to the Bureau of Mines, they came from the same source of material as this particular document for which he has vouched. Therefore, what the Bureau of Mines has is the same as this document, and that Bureau of Mines' material is not basic material.

36462 Trial Examiner Norwood: Well, aren't you willing for the Commission to go up here and verify that,—go up to the Bureau of Mines and verify that?

Mr. Brick: I think they have those shipment figures.

Mr. MacIntyre: No, we do not, and that is all we ask, just what Your Honor put there in a question.

Mr. Seeley: Do you mean to say, Mr. MacIntyre, that Counsel for the Federal Trade Commission, or none of its agents, have the shipment figures which the Bureau of Mines have had?

Mr. MacIntyre: That is true.

Trial Examiner Norwood: I think it is a very reasonable request, and, of course—

Mr. Brick: Of course it is unreasonable. It is nothing more than a whim.

Mr. Seeley: I do not see how it helps any. Your Honor.

Trial Examiner Norwood: I thought it was a very reasonable request.

36464 (RESP. EX. 2711 was offered and received in evidence.)

36465 Northwestern States has a cement plant property at Gilmore City, Iowa. Northwestern States estimated its capacity on the basis of experience in operation. We never operate that for a complete calendar year, but on the basis of the portions of years we have oper-
36466 ated I will say that that plant is capable of producing between 350,000 and 400,000 barrels a year.

By Mr. Seeley:

Q. Were you aware that Mr. Mallory had given what he calls an estimated clinker capacity to that plant of

450,000 barrels a year? I refer now, Mr. MacDonald, to Commission's Exhibit No. 3205-C.

A. No, sir.

Q. In so far as the estimate which you have given us, your own estimate is concerned, were you influenced to any extent or have you ever paid any attention to this estimate of Mr. Mallory's?

A. No, sir.

Q. Were you aware that Mr. Mallory had given a so-called estimated clinker capacity to your Mason City plant of 2,688,000 barrels annually? I refer now to the same exhibit, Mr. MacDonald.

A. It seems to me that I have a recollection that Mr. Mallory put out some capacity figures, but I do not recall what they were.

Q. Did that estimate have anything to do with the estimate that you have given us here today?

A. No, sir.

Q. You have told us that your report, your production and shipments to the Bureau of Mines, what use, if any, do you make—I beg your pardon. Do you receive the reports of the Bureau of Mines?

36467 A. Yes, sir.

Q. And what use, if any, do you make of those figures?

A. I have a record compiled from those figures, which is placed on my desk monthly, and which shows the total shipments by all of the companies in each of the States in which we operate.

Q. What use do you make of that?

A. It enables me to keep a sort of a tab on how much cement is being consumed in these various States.

Q. In comparison with what?

A. In comparison with previous years.

Q. Do you check your own figures on those shipments against those figures?

A. Well, we do, in a way; yes, sir.

Q. Do you make any use of figures on production or stocks on hand?

A. None whatever.

36469 Q. For what districts do you use the Bureau of Mines' figures on shipments that you told us about?

A. District 7.

Q. Any other ones?

A. I don't know as we—
Q. Received them.
A. We do not compile anything but District 7. Bureau of Mines, did you say?
Q. Bureau of Mines' figures.
A. Yes; just District 7.
Q. You say you do not concern yourself with others?
A. We do not compile them even for that district, Mr. Seeley. We make our compilation by States, not by any district.

36470 Q. Well, for the record, in order that the record may be straight, do you compare the figures reported in these Bureau of Mines' reports for the companies into Bureau of Mines' districts, or do you compare them with the figures reported for all the companies that ship into the States that you do business in?
A. We make our compilation on the total shipments within the States in which we sell cement, but not on the basis of District 7, Bureau of Mines.

36471 Q. Did any plan for sharing business or any allocation of business ever come into operation in any of your sales territory?
A. No, sir.

36473 Washington, D. C.
April 12, 1940.

36474 B. A. MacDONALD thereupon resumed the stand and testified further as follows:

Trial Examiner Norwood: It is hereby stipulated and agreed that the witness, B. A. MacDonald, vice-president of the Northwestern States Portland Cement Company, shall be deemed to have given direct testimony in this proceeding, subject to the same conditions agreed on with respect to the stipulated testimony of J. L. Nelson heretofore appearing in the record, as follows:

Organization of the Northwestern States Portland Cement Company:

36475 The Northwestern States Portland Cement Company was originally organized in 1906 as a West Virginia Corporation. On April 25, 1934, all of the assets

of the West Virginia corporation were transferred to the Northwestern States Portland Cement Company, an Iowa corporation. Northwestern States is and has been since April, 1934, an Iowa corporation.

The company's principal office is in Mason City, Iowa, and it has one branch sales office in Minneapolis, Minn. The company has no warehouses or silos.

The Northwestern States Portland Cement Company has two plants which are located respectively at Mason City, Iowa, and Gilmore City, Iowa. Northwestern States Portland Cement Company built its Mason City plant in 1908 and purchased its Gilmore City plant in 1926 at a time when the demand for cement in that territory was good. Except for short periods of shutdown, we have operated the Mason City plant continuously since it was built. We have not produced cement at our Gilmore City plant since 1930, when we shut it down. We found a sharp decrease in demand about that time and the capacity of our Mason City plant was more than sufficient to supply our entire trade.

Mason City was chosen as the site for the Northwestern States plant by reason of its favorable location with respect to raw materials, and with respect to the available market. The limestone quarry and the secondary
36476 materials used by the Northwestern States Portland Cement Company are situated right at the plant.

The Northwestern States Portland Cement Company has kept its Mason City plant modernized at all times.

The Northwestern States Portland Cement Com-
36477 pany is not affiliated in any way with any other cement manufacturing company. None of the officers or directors of the Northwestern States Portland Cement Company are officers or directors of any other cement manufacturing company.

Sales Territory:

The Northwestern States Portland Cement Company normally ships cement into the States of Iowa, North Dakota and Minnesota, and into western Wisconsin. We have salesmen soliciting business in all of those territories. We ship an occasional car into Nebraska, South Dakota, and Illinois when requested to by a friendly contractor or old dealer-customer. The average haul that we generally make from our Mason City mill is not more than 150 miles.

The Northwestern States Portland Cement Company has 17 salesmen at the present time. This is the largest sales force we have ever had. Since I have been with the company we have been gradually increasing our sales force and concentrating our sales efforts in territories close to our mill owing to the intensive competitive conditions that we find.

In the territory in which the Northwestern States Portland Cement Company solicits business, it encounters regularly the competition of fifteen other cement producing companies:

Marquette Cement Manufacturing Company.
Universal-Atlas Portland Cement Company.
36478 Huron Portland Cement Company.
Petoskey Portland Cement Company.
Alpha Portland Cement Company.
Medusa Portland Cement Company.
Missouri Portland Cement Company.
Ash Grove Lime & Portland Cement Company.
Hawkeye Portland Cement Company.
Penn-Dixie Cement Company.
Nebraska Portland Cement Company.
South Dakota Cement Company.
Lehigh Portland Cement Company.
Dewey Portland Cement Company.
Lone Star Cement Company.

The Northwestern States Portland Cement Company has found that all of the foregoing competitors actively solicit business in some part of the territory in which it does business.

Standardization:

Neither I, nor any official of the Northwestern States Portland Cement Company, to my knowledge, has ever had any conferences with competitors concerning cement specifications. The quality of the cement of the Northwestern States Portland Cement Company is, and always has been, above the minimum specifications of the American Society for Testing Materials and the Bureau of
36479 Standards of the United States Government. Competition with other brands sets a considerably higher standard, and in order to bring our cement up to the quality of the best cement on the market we have to exceed standard specifications substantially. We cannot

sell our cement unless it is comparable with the higher standards of competitive cements that we meet in the market. In spite of the fact that our product has always exceeded the minimum requirements of the standard specifications, our company has never been able to obtain a premium in price over other brands.

The Northwestern States Portland Cement Company has been making high early strength cement for a period of about one year. Prior to that time we met what little demand we had for high early strength by selling the Incor brand. Our total sales never amounted to more than 4,000 barrels per year. We handled it as an accommodation to any of our regular customers who called for it and as an aid in helping us to sell our standard product.

Our high early strength cement is above the specifications of the American Society for Testing Materials. Due to competition we must make a product considerably above the minimum requirements of the standard specification in order to satisfy our customers.

The Northwestern States Portland Cement Company has never had any representative on any specifications committee. We have never declined to make any specification requested by our customers. The North-
36480 western States Portland Cement Company has no policy in regard to special specifications other than that we are willing to make any cement that the customer wants.

The Northwestern States Portland Cement Company has never had occasion to make any low heat cement, or any moderate heat cement or any sulphate resistant cement.

There is no obligation on us to make our cement up to the standards recommended by the American Society for Testing Materials or by any other society. The only obligation we consider is the necessity of competing for the business. If we didn't get well above the requirements of the American Society for Testing Materials we couldn't sell our cement.

The Northwestern States Portland Cement Company has never taken any steps of any kind toward the elimination of special specifications.

Method of obtaining information as to Competitive Prices:

The Northwestern States Portland Cement Company

obtains all of its information concerning prices of competitors by means of information picked up in the field by our salesmen. Our salesmen are instructed to report immediately to the home office any changes in competitive prices or practices that they may find or learn of in the field and to pick up and send in actual quotations or announcements of competitors wherever and whenever
36481 possible. Our salesmen are visiting prospective customers and selling or trying to sell cement constantly. We also secure such information direct from our dealer customers, of whom we have about 1,400, and from other customers by way of telephone calls, letters, and quotations of competitors which dealers send in to us. Other sources of information concerning competitors' prices are tabulations of bids submitted to governmental agencies, State and Federal. Other than the foregoing, we have no source of competitive price information.

Through our salesmen or dealer sources, we obtain information as to competitive price changes almost as soon as competitive quotations are in the hands of the trade. Immediately upon learning of a price change at some point in our marketing area, we get in touch with all of our salesmen and as many of our dealer customers as we can in order to ascertain whether the price change is general. Having satisfied ourselves as to the nature of the change, we meet it if the new prices are lower than prices we have been quoting and we desire the business. If the new prices are higher, we decide whether or not we shall follow them and act accordingly.

Method of price quotation:

Our practice is to send out price quotations to our customers at the time of any change in our prices. We send quotations to every point at which we do business or have any likelihood of doing business.
36482 It has been our experience that the prices quoted by competitors in our territory usually reflect a mill base at some competitive mill. By deducting freight from the competitors' prices we meet in the field we have been able to ascertain which mills' mill bases are reflected and the amount of the mill base.

When we have satisfied ourselves that there has been a price change in our marketing territory, we do not check competitive prices at every destination in that area

before sending out our own quotations. We take the new prices which we have learned of and by deducting the freight from the destinations involved to all mills competing in our marketing territory, we attempt to determine whether they reflect a mill base at some producing mill.

We have no assurance that the prices we quote will be the lowest prices quoted at the destinations, nor do we have any foreknowledge of which mills are so-called basing mills or of what the so-called mill base may be at any particular mill. It has been our experience that there is no limit to the number of mills that may be so-called basing mills at any particular moment. Particular territories do not reflect a mill base at the same mill at all times. It has been our experience that prices at any given point reflect a mill base at one mill at one time, and at another mill at other times and sometimes reflect no mill base at all.

36483 None of the prices we have ever found in our marketing territory have reflected a mill base at a non-producing point nor have we ever used a non-producing point as a mill base.

We have never had any understanding or agreement with any of our competitors with regard to the establishment or maintenance of any mill as a basing mill, or with regard to the amount of the mill base at any particular mill, or with regard to the prices we will charge for our cement. We have never received information as to prices or mill bases in the form of lists or otherwise from any of our competitors and have never sent such information to any of our competitors. We do not publish lists of mill bases.

Qualifications of dealer:

The Northwestern States Portland Cement Company has always had an idea as to what it considered to be a qualified dealer. Prior to the time that I came with the Northwestern States Portland Cement Company I was acquainted with cement dealers. My notions as to the qualifications of a cement dealer, have not changed, generally, since I have been in the business.

In deciding whom we will sell as a dealer, the policy of the Northwestern States Portland Cement Company is flexible. Our decision is based on the individual case as determined by local conditions.

I recall the so-called definition of a dealer which was contained in Article XI of the Code of Fair Competition for the Cement Industry under the National Recovery Act. To my mind there was no practical difference between the idea embodied in the statement of the qualifications of a dealer which was contained in the N.R.A. Cement Code and the ideas that I had prior to the N.R.A. period as to what was a qualified dealer.

In deciding whether to sell a man as a dealer we do not care whether or not he is being sold by other cement manufacturers. The Northwestern States Portland Cement Company has at times declined to sell to people who were being sold as dealers by some of its competitors. In deciding whether to sell a man as a dealer we do not consider, and have never considered whether or not he is a member of any dealer association. The Cement Institute has never had anything to do with whom the Northwestern States Portland Cement Company has sold or not sold as dealers.

The Northwestern States Portland Cement Company has never had any understanding wth any of its competitors or with any dealer or group of dealers as to whom it will sell as a dealer. We have always been free to sell to any dealers that we choose to sell and have never been guided by anything but our own individual independent judgment.

We do not distinguish between any so-called
36485 "recognized" and "unrecognized" dealers. I have never seen, nor do I know of anything about any so-called "black list" of dealers.

In some towns we have more than one dealer. We do not have any rule as to how many dealers we will sell in a given town. Most of our dealers handle other brands of cement as well as our own. We have about 1,400 dealers to whom we are shipping currently from time to time. We have increased the number of our dealer accounts considerably since I have been with the company.

In deciding whether to sell to a dealer, we consider his ability to do a promotional job, his ability to render services to the consumer, and his financial responsibility.

We solicit and have solicited the business of the dealers who are not so-called "regular" customers of the Northwestern States Portland Cement Company, and we have made sales to such dealers. We have found that our competitors solicit and have solicited the business of dealers

who are so-called "regular" customers of ours and have sold such customers.

Importance of the dealer:

The dealer has always been the chief outlet for the cement of Northwestern States Portland Cement Company. We have found that through the years over 65 percent of our total sales have been made to dealers.

36486 The Northwestern States Portland Cement Company has never used any sales agents or distributors in marketing its cement. There has never been any middleman, other than the dealer, between the Northwestern States Portland Cement Company and the consumers.

Trucking:

The Northwestern States Portland Cement Company has never had any demand for truck delivery at its Mason City plant, except for a brief period in 1920 when there was a shortage of railroad cars.

When the Northwestern States Portland Cement Company purchased the Gilmore City plant, deliveries were being made to customers' trucks at that plant, at carload delivered prices, with freight allowed to the destination involved, and our company continued that policy as long as the Gilmore City plant was in operation.

The amount of cement delivered to customers' trucks at the plants of the Northwestern States Portland Cement Company never comprised more than a negligible portion of our total shipments.

The Northwestern States Portland Cement Company never charged 15 cents or any other amount as premium for delivery to customers' trucks at either of our plants.

We have never delivered cement in our own or in hired trucks.

36487 The Northwestern States Portland Cement Company has never had any agreement or understanding with any of its competitors or dealers, or with any dealer associations or railroads with regard to the trucking of cement. We have never had any contact or discussions or any correspondence with railroads, or with any dealer association or with any competitors in regard to trucking of cement.

Diversions in transit:

The Northwestern States Portland Cement Company is and always has been opposed to diversions of its cement

shipments in transit, and it has always endeavored to prevent such diversions. The reason for this policy is that the diverted shipment may turn up at a point where our company has a regular dealer whose good will we value more than that of the customer who diverts the shipment.

The Northwestern States Portland Cement Company has never had any serious problem with respect to diversions of its cement in transit.

I have never had any discussions or contacts with competitors concerning diversions of cement in transit. The Northwestern States Portland Cement Company has never had any agreement or understanding with competitors or railroads or dealers or with anyone else regarding its policy as to diversions of its shipments in transit.

Imported cement:

36488 The Northwestern States Portland Cement Company does not sell cement in competition with imported cement and has never come into competition with any imported cement. We have never competed with any other domestic mill, to our knowledge, that does come into competition with imported cement. The Northwestern States Portland Cement Company has never had any interest whatsoever in imported cement and has never taken any steps or measures with respect to the competition of imported cement. We have never been a party to any agreement or understanding regarding imported cement. I know of no dealers, or prospective dealers, of the Northwestern States Portland Cement Company who have ever traded in imported cement.

The Northwestern States Portland Cement Company has never shipped any cement by water. Water transportation is not available for the delivery of cement from either of the mills of the Northwestern States Portland Cement Company and there has never been any occasion or opportunity, to my knowledge, for the Northwestern States Portland Cement Company to employ water delivery in transportation. Neither of our mills has lost any geographical advantage to my knowledge. I do not know of any so-called "cheaper than rail" transportation by which I can distribute my cement. There are no benefits of cheaper transportation available to our company, to my knowledge.

36489 By Mr. Seeley:

Q. Mr. MacDonald, is the Northwestern States Portland Cement Company a member of The Cement Institute?

A. Yes, sir.

Q. How long has it been a member?

A. Since the inception of the Institute.

Q. Did you attend a meeting of cemen manufacturers in Chicago on or about January 7, 1930?

A. Could you give me something to identify that other than the date?

Q. Well, do you recall a meeting of cement manufacturers in Chicago in the month of January, 1930, to consider membership in The Cement Institute?

A. Yes, sir; I think I do.

Q. Was that the purpose of the meeting, as you recall it?

A. Well, sir, referring to the meeting I have in mind, it was for the purpose of formulating the Chicago division of The Cement Institute—organizing it.

36490 Q. And has the membership of your company in The Cement Institute continued up to the present time?

A. Yes, sir.

Mr. Seeley: I am referring now, Mr. MacIntyre, to Commission's Exhibits 136 and 1270.

By Mr. Seeley:

Q. Mr. MacDonald, will you tell us what was your understanding of the purposes of The Cement Institute at that time?

A. It was formed for the purposes of gathering and disseminating statistics, and I believe the matter of reporting contracts was brought up at or about that time.

Q. Do you recall whether a Mr. Mallory was present at that meeting?

A. I have no independent recollection of that.

Q. Now, what was the sense of that meeting, if you recall it? Did it have anything to do with raising prices?

A. Nothing whatever to do with prices.

Q. To your knowledge, was there any discussion at that meeting of the production of output?

A. No, sir.

Q. Do you recall whether you were appointed a member

of the advisory committee of The Cement Institute at that meeting?

A. Yes, sir.

Q. Were you appointed a member of the advisory committee?

A. Yes, sir.

36491 Q. Have you also heard that same committee referred to as the executive board?

A. I don't recollect anything like that.

Q. Well, do you know of any executive board of The Cement Institute at that time—of the Chicago division?

A. Not of the Chicago division.

Q. What did you understand to be the functions of the advisory committee that we have referred to?

A. To organize the personnel of the Chicago branch of the Institute, to hire a manager, rent office space, and arrange for other personnel equipment.

Q. Subsequent to the meeting at which you recall that you were appointed a member of the advisory committee, did you attend any other meetings of the advisory committee?

A. Do you mean at later dates?

Q. Yes; subsequent to this meeting to which we have referred, do you recall attending any other meetings of the advisory committee?

A. I could not recall any specifically to mind.

Q. Other than this advisory committee, have you ever been a member of any committees of The Cement Institute?

A. Any committees?

Q. Yes; other than this one.

A. No, sir.

36492 Q. Did your company ever operate on any so-called restriction of output?

36493 A. No, sir.

Q. And did you ever have any understanding to do so?

A. No, sir.

36494 Q. Did you understand that the Institute had anything to do with trade practices?

A. No, sir.

Q. Or prices?

A. No, sir.

36495 Q. Has the Northwestern States Portland Cement Company ever reported any specific job contracts to The Cement Institute?

A. Yes, sir.

Q. What kind of contracts was reported?

A. All contracts of so-called specific work contracts that required delivery beyond 15 days.

Q. Was there any reporting by your company at any time of potential or anticipated contracts?

A. No contracts, except those actually closed.

Q. And was there any reporting of orders for immediate sales of cement?

A. No, sir.

Q. Will you tell us briefly how did the contract reporting service operate, so far as your company was concerned?

A. Well, it enabled us to check any duplication of contracts that might occur between the contracts that we had reported and the contracts reported by our competitors.

Q. In connection with the contracts which you reported, did you ever file any prices?

A. No, sir.

Q. Now, did you find any duplications of contracts, as the result of your reporting contracts?

A. We did.

Q. And where you found that you had a contract and a competitor had a contract for the same job, tell
36496 us, as briefly as you can, how you handled the situation?

A. We tried to influence the purchaser to use our cement, if we needed the business.

Trial Examiner Norwood: Do these contracts have an exclusive clause; that is, when you take a contract for a particular job, do they agree to take it all from you?

The Witness: If the contract is so written; yes, sir. Sometimes they would agree to take half, or a certain specific amount, but the contract requires that if they do not take it all they take a specific amount, and it is used exclusively in the construction of that particular job.

Trial Examiner Norwood: You find contracts in violation of those terms?

The Witness: I would not say it was exactly in violation, but we may sell a job through a dealer, and one of our competitors would sell the same job through another

dealer, and when that occurred, if we needed the business, we would try to influence the purchaser to use our cement and cancel the other fellow's contract.

By Mr. Seeley:

Q. Now, there were cases, Mr. MacDonald, where you canceled your contract?

A. Yes, sir.

Q. We referred a moment ago to the advisory
36497 committee in the meeting at which you were appointed a member. Did the advisory committee at that meeting have any discussion concerning the cancellation of contracts, to your knowledge?

A. It did not.

Q. Did any such discussion or activity take place at any meeting of the Institute that you attended?

A. No, sir.

Q. Well, what was your understanding, did the advisory committee have anything to do with contract reporting?

A. My understanding was the advisory committee had nothing to do with anything in the Institute except the formation and organization of the personnel of the office.

Q. Well, where contracts were duplicated, did the Cement Institute, to your knowledge, ever concern itself with which contracts should be canceled?

A. They did not.

Q. And did you ever have any agreement with any of your competitors with regard to this matter of cancellation of contracts?

A. No, sir.

Q. In addition to duplicated contracts, which you have told us about, did you find any so-called padded contracts?

A. Yes, sir.

36499 Trial Examiner Norwood: Now, you may tell us what you mean by padded contracts.

The Witness: Well, there would be two types of padded contracts, Your Honor. One would be too much cement purchased for one specific job, and one would be cement purchased for a job that never existed, or the contract for which had never been let.

By Mr. Seeley:

Q. Mr. MacDonald, we have just heard a statement from Counsel for the Commission. I would like to ask

you now whether in reporting contracts to The Cement Institute, and receiving reports of duplications, what was your understanding, did it ever have anything to do with the prices?

A. If I get the tenor of your question, the price was not the influencing factor in our determination whether or not to cancel the unfinished balance of the contract, if that is what you mean.

Q. Well, in reporting, was it your purpose in reporting contracts—was it your purpose to protect yourself as to the quantity or commitment that you would be
36500 obligated for, or was it a matter of price?

A. Our purpose in reporting the contract to the Institute was twofold, to first check our commitments to know what we had in actual sales commitments, and to prevent the diversion of low-price cement to current market business.

Q. Well, when you received word that a contract which you had been following was closed by another company, did your sales department continue to follow that contract?

A. Only to the extent of confirming the report that it was actually closed.

Q. Has the Northwestern States Portland Cement Company ever reported contracts to any agency or bureau other than The Cement Institute?

A. No, sir.

Q. Did you ever learn of any instance where The Cement Institute took any position in the matter of the cancellation of contracts?

A. No, sir.

Q. Finally, did your company ever instruct any of your salesmen that the Institute had anything to do with canceled or duplicated or padded contracts?

A. No, sir.

Q. Now, ordinarily, Mr. MacDonald, does your company attempt to limit the amount of cement that you will sell to any customer?

36501 A. You mean in quantity?

Q. Yes.

A. We will sell them all they can pay for and take.

Q. Do I understand you have no objection to selling a customer any quantity he wants within your capacity to ship?

A. If he will take it and pay for it, that is all.

36502 Q. Did you personally attend meetings of The Cement Institute after the passage of the National Industrial Recovery Act?

A. Yes, sir.

Q. What did you understand to be the purpose of The Cement Institute during the N.R.A. period?

A. This was our industry organization under the Code.

Q. During the Code period what was your understanding, did the trustees of The Cement Institute have anything to do with prices or marketing policies, to your knowledge?

A. No, sir.

Q. You told us about the advisory committee in the early period of The Cement Institute. Has any other representative of your company held any office or served on any committee or board of The Cement Institute?

A. No, sir.

Q. Did you ever look to The Cement Institute for

36503 interpretation of any of your policies?

A. No, sir.

Q. During the N.R.A. period, so-called, did the Northwestern States Portland Cement Company file prices with the Code Authority?

A. Yes, sir.

Mr. Seeley: I am referring, Mr. MacIntyre, to Exhibits 408, 9, et cetera.

By Mr. Seeley:

Q. What was your understanding,—was there any restriction upon the kind of prices that you could file?

A. No, sir.

Q. Well, did the company receive notices that prices had been filed with the Code Authority by other companies?

A. Yes, sir.

Q. Did you or did you not feel that you must quote those same prices?

A. Well, as I recall it, we had to quote the prices that we or someone else had on file. We could not go below them, according to my recollection of it.

Q. To your knowledge, did the Code Authority ever attempt to control prices that were filed?

A. No, sir.

Q. Did it ever attempt to place any restriction upon your company as to what prices or terms it could quote?

36504 A. No, sir; other than they had to be filed.

Q. And does that apply to terms and conditions of sale, as well?

A. Yes, sir.

Q. Did you or did you not consider that the Code Authority had authority to fix prices?

A. We did not consider that they had authority to fix prices.

Q. In filing prices with the Code Authority, where did you take the information from?

A. We took it from our record of quotations in effect to our customers on the date that we made the filing.

Q. Does your company file prices with The Cement Institute or with any other organization today?

A. No, sir.

Q. How long has it been since your company has filed any prices?

A. Since the date of the Schechter decision. I could not give you the exact date on it.

Q. Did you or did you not consider that you were required to file prices after the Schechter decision, to which you refer?

A. We did not consider that we were required to file prices since then.

Q. Do you recall the Trade Practices Committee of The Cement Institute?

A. Yes, sir.

36505 Q. What was your understanding as to the purposes of the Trade Practices Committee?

A. They made a study of what they considered sound trade practices and recommended them to the industry. That is my recollection of it.

Q. Did you consider that they had any authority?

A. No, sir.

Q. Did you consider that they had anything to do with the N.R.A., and if so, tell us what?

A. Well, of course, the N.R.A. was out, but the Government was making an effort to aid in recovery, and, as I recall it, some official of the Government requested that industry should continue on the practices that were in effect under the N.R.A. in order to aid recovery, and we

expected, possibly, a substitute law for the N.R.A. to be passed; or something of that sort.

36507 Q. Mr. MacDonald, do you recall a so-called Compendium of Trade Practices?

A. Yes, sir.

Q. Did you ever make any use of this Compendium? I will put it this way: Did the Compendium have any effect upon the marketing practices of the Northwestern States Portland Cement Company?

A. No, sir.

Q. Did your company consider itself bound to adopt or follow any of the terms or conditions of sale or practices contained in the Compendium?

A. No, sir.

Q. Was there any agreement or understanding
36508 that your company should or should not follow those practices?

A. No, sir.

36509 Q. Mr. MacDonald, do you recall a questionnaire issued by Professors Clark and Burns?

A. I recall that there was such a questionnaire; yes, sir.

Mr. Seeley: I am referring, Mr. MacIntyre, to Commission's Exhibit 967.

By Mr. Seeley:

Q. Did your company answer that questionnaire?

36510 A. Yes, sir.

Q. In filling out that questionnaire what did you understand the purpose to be?

A. I understood that the industry had employed these —shall I call them economists—to make a study of the marketing practices of the industry and make a report to the industry, as to whether they considered them sound.

Q. Did anyone in your company have any part in the preparation of the questionnaire?

A. No, sir.

Q. Did you or anyone in your company, to your knowledge, have any contact with the professors?

A. No, sir.

Q. Do you know of any attempt to influence the professors?

A. No, sir.

36514 Q. Mr. MacDonald, do you recall an executive order of the President of the United States, issued

on or about March 14, 1934? I am referring you to Commission's Exhibit No. 179, Mr. MacIntyre.

Mr. MacIntyre: That is the wrong order, then.

Mr. Seeley: What is that?

Mr. MacIntyre: You are referring to the wrong order if you are referring to 179. 179 was issued June 29, 1934.

Mr. Seeley: That is correct. That is a modification of a prior order of March 14, 1934.

Trial Examiner Norwood: Is that the tolerance order?

Mr. Seeley: What is that?

Trial Examiner Norwood: Is that the tolerance order?

Mr. MacIntyre: Yes, 15 per cent.

By Mr. Seeley:

Q. What is your answer, Mr. MacDonald? I say, do your recall?

A. I recall it now; yes, sir; after this discussion of it.

Q. Did your company quote the Government 15 per cent below its other customers?

A. No, sir.

Q. Why not?

Trial Examiner Norwood: That was 15 percent below filed prices, wasn't it?

36515 The Witness: Yes, sir.

Trial Examiner Norwood: Did you make any of those quotations?

The Witness: No, sir.

By Mr. Seeley:

Q. We were talking, Mr. MacDonald, about the Executive Order of June, 1934, and His Honor asked you concerning whether you quoted to the Government below your filed prices.

I would like to ask you whether you were at that time quoting to any of your commercial customers below your filed prices.

A. No, sir.

Q. I think you told us why you did not quote to the Government or make any quotations to the Federal Government below your other customers. I want to change that. The question was why did you not quote to the Federal Government 15 percent below quotations to your other customers?

A. Well, the only opportunity we had of quoting to the Government at all, as I recall it, in those days, was on the Fort Peck Dam, and the price was so low on that job

that we did not care to bid below the price that was quoted.

36516 Q. Then, as I understand your answer, you had no occasion to quote to the Government 15 percent below your quotations to your other customers?

A. That is right.

Trial Examiner Norwood: Except on the Fort Peck job.

The Witness: Except the Fort Peck; yes, sir.

By Mr. Seeley:

Q. Did you attend any meeting, or did any other member of your company, to your knowledge, attend any meeting at which this Executive Order was discussed?

A. No, sir.

Q. Did you ever have any discussion with any of your competitors as to whether your company would or would not quote to the Federal Government 15 cents below its quotations to its regular trade?

A. None whatever.

Q. Did the Code Authority of the cement industry, to your knowledge, take any position as to whether this so-called tolerance order should be acted on?

A. None that I know of.

Q. Did the Cement Institute take any position in the matter, to your knowledge?

A. None that I know of.

Q. To your knowledge, has The Cement Insti-
36517 tute ever interfered in any way with competitive conditions?

A. No, sir.

Q. Has it ever had anything to do with specifications for cement?

A. No, sir.

Q. Have any of the so-called larger companies, which are referred to in this record, attempted to influence your company in any matter of policy?

A. No, sir.

Q. Have you ever had occasion to discuss prices or policies with people over at the Lehigh plant in Mason City?

A. No, sir.

Trial Examiner Norwood: Did you discuss them anywhere else?

The Witness: No, sir.

By Mr. Seeley:

Q. When you came to the Northwestern States Portland Cement Company, I think you told us that that was in 1919.

A. Yes, sir.

Q. To whom was your company selling direct at that time; I mean, to whom other than to dealers?

36518 The Witness: We were selling concrete tile plants, and railroads. We would have sold the Government, too.

Q. What is that?

A. We would have sold the Government, had we had an opportunity.

Q. As to those classes of trade that you have just mentioned, did you or did you not consider whether the dealer rendered any services?

A. We considered that the dealer did not render any services on those classes of trade.

Q. Then, you did give consideration to them?

A. Yes, sir.

Q. Were you selling direct to State highway departments at that time?

A. I don't recall any.

Q. Were you selling direct to any contractors at that time?

A. I don't think so.

Q. Do you sell direct to contractors and State highway departments today?

A. Yes, sir. Well, I will withdraw that so far as the State highway departments are concerned. We sell direct to contractors, but the State highway departments

36519 are not buying. We would be glad to sell them if they were buying, but they are not buying.

36520 Q. On the work that you sell direct to customers other than to dealers, do you sell them at the same prices that you sell to dealers?

A. Yes, sir.

Q. Has the Northwestern States Portland Cement Company had any agreement or understanding at any time with its competitors in regard to the alleged classification of business, or alleged division of customers?

A. No, sir.

Q. During the period of the N.R.A. did your company

attempt to follow the Code of Fair Competition for the Cement Industry?

A. We made one exception to it.

Q. Are you referring to Article XI?

A. Yes, sir. All the other provisions of the Code, of course, the labor provisions, and hours and wages, and that sort of stuff, we followed that religiously.

36521 Q. Well, other than this one exception, I take it from your answer, that the marketing policy set forth in Article XI did not involve any change in the practices of your company?

A. No substantial changes; no, sir.

Q. Tell us about this one exception, what was it?

A. Well, as I recall it, Article XI provided that sales to bridge and culvert contractors outside of the city limits should be quoted direct. We did not feel that that was the proper thing to do, and we refrained from soliciting any of that type of business so that we would not violate the law.

Q. Now, as to that same type of business that you referred to, what did you find as to whether or not your competitors did or did not take that business? I am referring now to the period of the N.R.A. when this Article XI was in effect?

A. They quoted on it and sold direct.

Q. They did take it?

A. Yes, sir.

Q. Do you recall the suspension of Article XI?

A. I remember it was suspended; yes, sir.

Q. Well, after the suspension of Article XI, was there any change in the marketing policies and practices of your company?

A. No, sir; except that we did start to quote on those bridge and culvert work, through the dealer, that is all.

Q. Did your company ever take any action for or against Article XI?

36522 A. No, sir.

36523 Q. Mr. MacDonald, how did you learn of the suspension of Article XI?

A. I believe we were notified by the Code Authority. I am not certain about that.

Q. Did you attend any meeting at which Article XI was discussed?

A. No, sir.

Q. Or any modification of it?

A. No, sir.

Q. Did you ever have any discussions concerning Article XI with any representative of dealer associations?

A. No, sir.

Mr. Seeley: In order to save time, Your Honor, I
36524 ask to have the following papers marked in a batch for identification.

Trial Examiner Norwood: What are they?

Mr. Seeley: These are letters, they are business correspondence, inter-office memos.

Trial Examiner Norwood: To show what?

Mr. Seeley: To show the reaction of this Respondent's dealers, contemporaneous reaction at the time to Article XI and to the policies of this company.

Trial Examiner Norwood: I think we have had enough of that.

Mr. Seeley: Upon which this company acted.

Trial Examiner Norwood: Just give the whole batch one number there, and if they are received you can letter them. Don't number them now, just give it one number, A to blank.

36525 The witness identified Resp. Ex. 2712 A-G as papers that came from the files of Northwestern States. These are letters between Northwestern States sales manager and its salesmen and correspondence between its sales manager and two or three of its customers relating to the company's methods of sales.

Trial Examiner Norwood: And it was with respect to selling direct or to dealers?

The Witness: Yes.

Trial Examiner Norwood: Selling through dealers, or direct, and so forth, and giving their reaction, just as counsel states; is that right?

The Witness: That is correct; yes, sir. They are January 12, 1934; January 25, 1934; December 10, 1932, March 12, 1934; March 26, 1934; March 30, 1934, and March 30, 1934.

Mr. Seeley: I just want to say at this time, Your Honor, that the dates which the witness has read off show that this batch of papers relate to the Code period.

Trial Examiner Norwood: Yes.

36528 (RESP. EXS. 2712-A to 2712-G, were offered and received in evidence.)

36529 By Mr. Seeley:

Q. Mr. MacDonald, are these papers that you have just referred to typical of the attitude which was expressed to you by your dealers, or are they not typical of the attitude at that time?

A. They are typical.

Trial Examiner Norwood: You took no attitude inconsistent with that during those times?

The Witness: No, sir. We have a great mass of that stuff.

By Mr. Seeley:

Q. Mr. MacDonald, there is just one more phase of this topic which I would like to ask you about: Do you recall a distribution policy or method of sales announced by the Lehigh Cement Company in February,

36530 1935?

A. I recall several methods of sale adopted by the Lehigh Portland Cement Company, but I cannot identify it by that date.

Q. I ask you whether this paper, Commission's Exhibit 2196,—is the policy referred to the one you have in mind (handing a document to the witness)? Does that help you any to recall?

A. I recall this announcement; yes, sir.

Q. How did you learn of it, Mr. MacDonald?

A. Reports from our salesmen.

Q. Did you discuss that policy with anyone in the Lehigh Cement Company?

A. No, sir.

Q. Did your company follow that policy of February, 1935?

A. Well, a great many companies were putting out policies about that time, as I remember it, and we had one put out by the Universal Company, I believe, that we—

Q. I want to call your attention to the date on this policy, February, 1935, and ask you to answer with respect to that policy.

Perhaps it will help if, before you answer that question, if I ask another question:

Do you recall a distributing policy announced

36531 by the Universal-Atlas Company in April, 1935? I refer to Commission's Exhibit 1903.

A. I think, Mr. Seeley, that is the one we copied and sent out, as I remember it; the one that the Universal put

out. I believe we made a copy of that and sent that out as our policy, if I recall correctly.

Q. Showing you Commission's Exhibit 1903, is this the policy you have just described?

A. It looks like it.

Q. Now, as to the other paper, I hand you Commission's Exhibit 2196, the Lehigh policy, which is dated in February, 1935, did your company follow that policy of February, 1935?

A. Well, at some date subsequent to this April 9, 1935, we sent out a policy.

Q. Well, how did you learn of that policy which is numbered Commission's Exhibit 1903, the Universal-Atlas policy of April, 1935?

A. One of our salesmen sent it in.

Q. Did you have any conversations with any of your dealers concerning that policy of the Universal-Atlas Cement Company, or did any of your salesmen, to your recollection, discuss the matter with dealers, with your dealers?

A. Well, the matter of issuing a policy was under constant discussion by our sales manager and our dealers; I cannot say what the salesmen did.

36532 Q. Well, what do you recall of the reaction of your dealers to that policy?

A. Well, our dealers—

Q. I refer to Commission's Exhibit 1903.

A. Our dealers had been endeavoring to get us to put out an announcement of policy for many years, and we hesitated in putting one out, but when all of our competitors came out with an announcement of policy we felt that that would have a competitive effect on our dealers, and we thought that if that was acceptable to our dealers we had better follow suit to help us in competing for business.

Q. Is Commission's Exhibit 1907 your own policy that you have just referred to (handing Exhibit to the witness)?

A. Apparently; yes, sir.

Q. Well, at the time you issued that announcement you told us about the attitude of your dealers as you found it. How many of your dealers, would you say, that observation applied to, roughly?

A. Oh, a great many of them, I could not give you definitely the number.

Q. A great majority?

A. Oh, not a majority. We do not contact that many, but a majority of our substantial buyers.

Q. Did you have any assurance that you could satisfy your dealers by adopting the policy which is repre-
36533 sented in that other announcement, Commission's Exhibit 1903?

A. Well, we felt it would satisfy some of our larger buyers who had been clamoring for some sort of an announcement for a good many years, so we adopted it.

Q. Well, how did it compare generally with your practice and policy at the time, then?

A. Substantially the same; it was what we had been following.

Q. Were there any important points of difference?

A. I do not think so. I might add there that we never had what you might call an inflexible sales policy, but any policy we issued was subject to our own interpretation of that policy, and that policy did not substantially change our previous selling practices, if that is the question.

Q. Well, what is the fact, have you or not been free to exercise your judgment as to whether you would sell direct to any class of customers?

A. We have always reserved the right to determine our own sales policy.

36535 Mr. Seeley: The offer which I made previously had to do with the Code period. This has to do with the subject of marketing policies of the spring of 1935, which the Commission has gone into at considerable length.

Trial Examiner Norwood: All right.

(The documents were marked for identification "Respondents' Exhibits 2713-A to 2713-M.")

The witness identified Resp. Ex. 2713-A to 2713-M as correspondence from Northwestern States files between its sales manager and various customers in regard to its method of selling.

36536 These are letters that the sales manager has written to the customers announcing that it is making no change in Northwestern States' sales policy.

This is a letter from one of Northwestern States' sales-

men sending in a competitive announcement from one of its customers.

Mr. Seeley: I offer these in evidence (handing the documents to Mr. MacIntyre).

Mr. MacIntyre: I would like to ask one question on voir dire, if I may.

Trial Examiner Norwood: Yes.

Examination on Voir Dire by Mr. MacIntyre.

Q. Mr. MacDonald, can you tell me whether or not the writers of these letters were members of the Northwestern Lumber Dealers Association or the Southwestern Lumbermen's Association, or can you point out any of them that are not members?

A. There are one or two that I am uncertain of.

Q. Uncertain in what manner?

A. As to whether they are members of the Northwestern Lumber Dealers Association, or not.

Q. Which ones are they?

Trial Examiner Norwood: They mainly do belong to it?

36537 The Witness: I think so, Your Honor.

By Mr. MacIntyre:

Q. Which are they?

A. Independent Lumber Yard, New Rockford, N. D., and Bingenheimer Mercantile Company at Mandan, N. D.

Q. You are not certain of them?

A. I am not certain of them. I think Bingenheimer is, and I think the rest of them are, but I cannot be certain about Bingenheimer and New Rockford.

36538 (RESP. EX. 2713-A to 2713-M was offered and received in evidence.)

Direct Examination by Mr. Seeley (Continued).

Q. Mr. MacDonald, is it possible for you to sell cement to your customers under a less favorable policy than your competitors?

A. Very difficult.

Q. Do you consider your present marketing policy to the best interest of your company?

A. Yes, sir.

Q. Has the Northwestern States Portland Cement Company ever had any agreement with competitors, or with any dealers, that it would not bid on W.P.A. work
36539 from a manufacturing standpoint? I refer now to record pages 14091 to 14122.

A. We have had no agreement with anybody as to whether we would bid or not.

Q. Were any of your salesmen ever instructed that you had any such agreement?

A. No, sir.

Q. Do you have any understanding as to what constitutes or does not constitute W.P.A. work?

A. Yes.

Q. Does that understanding have anything to do with what your competitors think constitutes W.P.A. work?

A. I don't know.

Q. What is your understanding as to the so-called W.P.A. work?

A. Work that is in progress, financed and furnished by the W.P.A., which is a Government agency.

Q. Have you ever sold that type of work direct, or, how have you sold that type of work, and for how long?

A. Through dealers.

Q. For how long have you sold it through dealers?

A. Always.

Q. You are speaking now of your history with the company?

A. Yes, sir.

Trial Examiner Norwood: Does quality have any
36540 thing to do with it?

The Witness: No, sir.

By Mr. Seeley:

Q. Mr. MacDonald, since you have been with your company, the Northwestern States Portland Cement Company, can you state whether your market area has grown or shrunk?

A. It has been both, but we are working in a larger area now than ever since I have been with the company. It is the largest today of any time since I have been with the company.

Q. Are there any markets in which you have competed at one time and do not compete at the present time?

A. Yes, sir.

Q. What are those markets?

A. Northeastern Nebraska and South Dakota, principally.

Q. Will you tell us what considerations led you to abandon those markets, if you did abandon them?

A. Well, in northeastern Nebraska we withdrew our salesman there when they put the plant in at Louisville, because he could not sell enough to pay his expenses, and in South Dakota we withdrew from that market, I believe, in about 1925, when the South Dakota plant started, because of the fact that the South Dakota plant competition drove us out of the State.

Q. First, as to the Nebraska market which you have referred to, I think you said that your salesmen could not make their expenses after the Louisville plant was built.

36541 A. Yes, sir.

Q. After the plant at Louisville, Nebr., was built?

A. Yes.

Q. Did the fact that that plant was situated within Nebraska have anything to do with that?

A. Only in the manner that they were rendered so much better service than our plant was that we could not compete there.

36542 Q. I think you said that you were shut out of South Dakota. Is that the wording you used?

A. I said that we withdrew from South Dakota when the South Dakota cement plant started in operation, I believe, back in 1925, because their competition forced us out.

36543 Q. Mr. MacDonald, at the time we adjourned for the lunch hour we were talking about your sales activity in the South Dakota area, and I think you told us that there came a time when competitively you were forced out of that area.

Do you still do business in some part of South Dakota?

A. Very little. We do not solicit any business there.

Q. Do you have any information as to the consumption of cement in South Dakota?

A. I know what it is in a general way; yes, sir.

Q. What does it amount to?

36544 A. It will average in the neighborhood of half a million barrels a year.

By Mr. Seeley:

Q. On such business as your company did in South Dakota, how did the average net which you realized compare generally with your other sales in other territories?

A. Very favorably.

Q. Did the action of Northwestern States Portland Cement Company in withdrawing generally from the South Dakota market have anything to do with the level of prices?

A. No, sir.

Q. To your knowledge, is the Rapid City mill—I should say the South Dakota mill at Rapid City—a so-called basing mill?

A. I consider that they are a basing mill; yes, sir.

Q. Did the Northwestern States Portland Cement Company ever issue any quotations based upon the mill at Rapid City, to your knowledge?

A. I believe there is territory where we recognize the Rapid City base in our quotations.

Q. Well, have you ever found quotations of competitors that reflected a change in the mill base at Rapid City prior to the time that quotations were issued, to 36545 your knowledge, by the Rapid City mill, itself? What do you recall, if anything?

A. I do not recall it.

Q. Can you tell us whether or not the Northwestern States Portland Cement Company made any change in its prices on or about January 16, 1930?

A. I cannot remember that specific date.

Q. Well, in order to save time, let me ask you at any time that your company has made changes in your prices, at points which were in the vicinity of or adjacent to the Rapid City mill, have you issued any different prices in the area of the Rapid City mill than you did elsewhere?

A. Well, as I just said, Mr. Seeley, I think there are some points, I recall, where the price is based on Rapid City. There is certainly not a great many of them, but I believe there are a few.

Q. Well, I do not think you perhaps understand my question. Does your company issue quotations at times which are related to a mill base at your own mill?

A. Yes, sir.

Q. Well, wherever you have issued such quotations, have you, at points which were in the vicinity of or adja-

cent to the mill at Rapid City, have you made any deviation in your prices in those points?

A. Well, I think there are points at—I am not certain now; there used to be a time when we did quote to
36546 certain points west of the Missouri River where the Rapid City base set the price, and we met the Rapid City competition there. I am not certain whether we quote those today, or not.

Q. Subsequent to January, 1930, can you recall whether the mill at Rapid City, to your knowledge, increased its prices?

A. My recollection is that the mill at Rapid City has increased their price several times.

Q. Would that be subsequent to January, 1930?

A. Yes, sir.

Q. And did your company meet those increases?

A. Yes, sir.

Q. Where you found them in effect.

A. Yes, sir.

Q. Has your company ever had any agreement or understanding with any of its competitors with respect to maintaining a price level in the areas around any cement mill?

A. No, sir.

Q. To your knowledge, is there any so-called custom in the industry of allowing your mill base—I refer to Mason City—a 15-cent price differential over the mill base at the South? I am now referring to pages 12551 to 12563.

A. No, si

Q. Has the Northwestern States Portland Cement Company had any so-called custom or practice of following the lead of the Lehigh Cement Company, or of any other competitor?

36547 A. In the way of prices?

Q. Yes.

A. We follow their competition.

Q. Do you have any practice of following the policies of any particular competitor?

A. We do not differentiate between any competitors.

Q. Has the Northwestern States Portland Cement Company ever submitted any bid to the State highway commission of Oklahoma?

A. No, sir.

Q. Has your company ever shipped or solicited anywhere in Oklahoma?

A. No, sir.

Q. Has your company ever solicited any business in Indiana?

A. No, sir.

Q. Has your company ever declined to quote to any State Government or business within your marketing area?

A. Not to my knowledge; no, sir.

Q. Since you have been with the company that you are now associated with, have you ever shipped any cement into Mississippi?

A. No, sir.

Mr. Seeley: I am referring now to Commission's Exhibit 1063, Mr. MacIntyre.

By Mr. Seeley:

Q. Has the Northwestern States Portland
36548 Cement Company ever shipped any cement into Colorado or Texas?

A. No, sir.

Q. Or into Utah?

A. No, sir.

Q. Has your company ever solicited any business in any part of those States?

A. No, sir.

Q. Does the Northwestern States Portland Cement Company sell its product at delivered prices?

A. Yes, sir.

Q. How long has that been the case?

A. Ever since I have been with the company.

Q. Do you have, or did you ever have, any policy of declining to bid f.o.b. mill to the Federal Government?

A. We never had a policy one way or the other.

Q. Has your company ever refused to quote to the Federal Government a mill price?

A. I do not think we have been asked to but once.

Q. And on that occasion—

A. We quoted them.

Q. On that occasion—

36549 A. We quoted.

Q. That occasion that you have just referred to, is that the so-called Good Friday invitation of the Pro-

curement Division of the Federal Government in March, 1938?

A. Yes, sir.

Q. How did you bid on that?

A. We bid f.o.b. the mill.

36551 Q. Mr. MacDonald, have any of your dealers talked to you about your bid on this Good Friday proposal we have been discussing?

A. Yes, sir.

36552 Q. Did you receive any complaints as the result of your bidding?

A. Yes, sir.

Q. What was the nature of those complaints, tell us, briefly?

A. Our dealers were very antagonistic to our bidding on the Good Friday bids.

Q. And did you consult anybody outside of your own company about this invitation?

A. No, sir.

36555 Q. Mr. MacDonald, a moment ago you were unable to say whether or not you had received invitations from the Federal Government for cement requirements to be delivered at points in Utah, Colorado, and Texas. I show you Commission's Exhibits, which are in evidence, Nos. 1387 and 1389, and I ask you if they help you any to recall whether or not you did receive invitations of that character. (handing the exhibits to the witness)?

A. Well, this shows we are on the mailing list for them, but they never came to my personal attention.

Q. Do you know whether or not your company bid on these invitations,—assuming that they did come to your company?

A. They never came to my personal attention; I say we never bid on them, of course.

Q. Has the Northwestern States Portland Cement Company ever withdrawn or requested the right to withdraw any bid made to the Federal Government or to any State Government?

A. No, sir.

36556 Q. Does your company sell any cement to the railroads?

A. Yes, sir.

Q. How do you quote to railroads?

A. F.o.b. their tracks.

Q. How long has that been your practice?

A. Ever since I have been with the company.

Q. Do you sell to any railroads who are not the originating carrier?

A. Yes, sir.

Q. Earlier today, Mr. MacDonald, you referred to the so-called Fort Peck job, or requirements; I think you told us you bid on the Fort Peck Dam requirements.

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Mr. Seeley: I ask to have marked for identification the following papers, all numbered as one exhibit.

(The documents were marked for identification "Respondents' Exhibit 2716-A to 2716-H.")

The witness identified Resps. Ex. 2716 A to H as a letter from the Portland Cement Association, which Northwestern States received, and the other is a copy
36557 of a letter from Northwestern States' chief chemist to him, both relating to the specification for the Fort Peck Dam. That letter from the chief chemist is written to him at his request.

36560 (RESP. EX. 2716-A to 2716-H, were offered and received in evidence.)

36561 Trial Examiner Norwood: In other words, you submitted these specifications to the Cement Association for report upon it in order to determine whether you could make it or not; is that right?

The Witness: Well, not just exactly; the Portland Cement Association had gone into this thing, and they made a report to us as to what the requirements of this special specification were, and I submitted them to our chief chemist for a report from him as to what it would be necessary for us to do to make this cement in order to meet those specifications.

Trial Examiner Norwood: And he turned the proposition down; did he?

The Witness: Well, he told us what we would have to do, our chemist did.

Trial Examiner Norwood: And did he recommend against it?

The Witness: Well, he told us that we would have to have certain materials to reduce the aluminum content of

our cement, and it would be a more expensive process of manufacture than just the standard Portland cement.

Trial Examiner Norwood: And on account of what he told you; you decided that it would not be a desirable order; did you?

The Witness: He even went further than that,
36562 Your Honor. We made a few brief tests to determine the advisability of our manufacturing that special type of cement, and it did not turn out to be satisfactory, and we decided not to quote on the subsequent letting. . . .

By Mr. Seeley:

Q. In bidding to the Federal Government, Mr. MacDonald, has your company ever considered it was obliged to employ any particular method of quoting?

A. No, sir.

Q. Have you ever had any discussions or conferences with any of your competitors as to your policy or lack of policy with respect to land-grant rates?

A. No, sir.

Q. Has your company ever filed any land-grant rates with The Cement Institute?

A. Not to my recollection.

Q. Have you ever obtained any land-grant information from your competitors?

A. No, sir.

Q. Have you ever known in advance what land-grant rates your competitors were going to use?

A. No, sir. That possibly might not obtain to the period during the N.R.A. I do not remember whether those were filed with the Code Authority of the N.R.A. or not.

36563 Q. You refer to the prices filed with the Code Authority?

A. Yes; and I do not remember whether the land-grant rates were filed with them or not.

Q. Does your company sell to cities, towns, and villages, Mr. MacDonald?

A. Do you mean direct to them, or them through a dealer?

Q. Well, do you sell cement to them, or have
36564 you had occasion to sell cement to them?

A. Through dealers, we do; yes, sir.

Q. Do you sell them on a specific job basis?

A. We would if we had an opportunity, and if their job was specific.

Q. Does that answer hold whether or not there was a contract awarded to a contractor?

A. No, sir. I mean that we would sell a city on a specific job whether or not the contract was awarded to a contractor.

Q. The other question is: Do you sell to so-called concrete products manufacturers?

A. Yes, sir.

Q. How do you sell them?

A. We sell them direct and through a dealer.

Q. You sell them both ways?

A. Yes.

Q. Do you have any rule about it?

A. No, sir; no inflexible rule.

Q. Going back to where we left off a moment ago, Mr. MacDonald, did your company use the so-called control clause?

A. I think in the Fort Peck Dam we did. That is the only occasion I recall.

Q. That is the only occasion?

A. Yes.

Q. Where did you learn of this so-called control clause?

36565 A. My recollection is that it was sent to us by The Cement Institute—by the Code Authority, I mean.

Trial Examiner Norwood: That is, it was a filing?

The Witness: Yes, sir.

By Mr. Seeley:

Q. Other than this Fort Peck Dam job, did you ever occasion in your company to use this so-called control clause?

A. Not to my knowledge.

Q. Let me ask you, other than this Fort Peck job, has the Northwestern States Portland Cement Company ever had occasion to quote to the Federal Government direct where land-grant rates were involved? In this the only occasion on which you used land-grant rates?

A. Well, any quotations we might make to the Government may or may not involve land-grant rates. That is a pretty hard question for me to answer, Mr. Seeley. I don't recall any.

Q. Has there been any case where, in your sales territory, there were any special rates that you knew of, to which the Government was entitled, and which you did not give the Government the benefit of?

A. No. In all the years that I have been with the Northwestern States Portland Cement Company, we have sold the Government just one car of cement.

Q. When was that?

A. About three weeks or a month ago.

36566 Mr. Seeley: I am referring, Mr. MacIntyre, to record, page 21065 to page 21071.

By Mr. Seeley:

Q. Finally, Mr. MacDonald, have you ever attended any meeting at which the control clause, so-called, was discussed, or have you ever discussed it with any of your competitors?

A. No, sir.

Q. Did you feel obliged to employ the control clause on the Fort Peck Dam job?

A. No, sir.

36568 Q. Coming to a new subject, Mr. MacDonald: What does your company use for freight rate information?

A. Our own freight rate books.

Q. Who makes those up?

A. We do.

36569 Q. How long has your company made up its own freight rate books?

A. Ever since I have been with it.

Q. What shipping points do you list in your books, in the books which you make up in your own company?

A. Do you want me to enumerate them?

Q. No, just tell me on what basis you select them.

A. We select them from a standpoint of them being competitive shipping points of cement.

A. As well as Mason City, of course.

Q. Do you list all shipping points which may be competitive points?

A. I believe we do; yes, sir.

Q. From what source are your books made up?

A. Freight tariffs.

Q. Does your company receive any freight rate books from The Cement Institute?

A. I believe we get one copy for certain States.

Q. What use do you make of those books of the Institute?

A. Practically none.

Q. Well, to the extent that you do use the books
36570 of the Institute, what use do you make of them?

A. Why, I think our traffic manager may occasionally use them to check with our books for accuracy.

Q. Well, you say checking. In case of any difference is he guided by the Institute books or by your own books, or how is he guided?

A. We use the tariff rate.

Q. Tell us, now, please, for what States you prepare your own freight rate books?

A. Iowa, Minnesota, Wisconsin, North Dakota, and a certain portion of Nebraska.

Q. South Dakota?

A. I mean a certain portion of South Dakota we do, yes.

Q. And you mentioned Nebraska.

A. A certain portion of Nebraska only.

Q. Does that cover all of your own market territory?

A. Yes, sir.

Q. Are you interested in whether or not your competitors use the same freight rate as you do?

A. No, sir.

Q. Do the tariffs in your territory group the shipping points?

A. Some of them.

Q. Do you provide your salesmen with your own freight rate books?

A. Yes, sir.

36571 Q. What use, do you know, do they make of the books?

A. They use them for the purpose of figuring prices.

Q. In the normal territory that one of your salesmen travels, does he have frequent occasion, or little occasion, to use the freight rate books in connection with prices?

A. I would say it would be infrequent.

Q. Does any one of your salesmen cover as much as one entire State?

A. No, sir.

Q. Do you carry routings in your freight rate books?

A. No, sir.

Q. Are the rates contained in your freight rate books in terms of cents per barrel or cents per hundredweight?

A. Cents per hundredweight.

Q. Do you use any conversion tables to convert the rates from tariffs into cents per barrel?

A. Yes, sir.

Q. Where do you get those tables?

36572 A. We made them up ourselves.

Q. How long have you had those tables of your own?

A. Ever since I have been with the company.

Q. Do you put those conversion tables, or any conversion tables, in your freight rate books?

A. Yes, sir.

Q. That your salesmen carry?

A. Yes, sir.

Q. Have you ever in your company used any conversion tables other than those which you make up yourself in your traffic department?

A. No, sir.

Q. Do the freight rate books that you use have anything to do with the price of cement?

A. No, sir.

Q. Does your traffic department—I take it you do have a traffic department.

A. We have a traffic manager; yes, sir.

Q. Does that department have anything to do with the prices of your product?

A. No, sir.

36573 Q. When your company issues quotations related to the mill base at Mason City, are those quotations made up of rates taken from your freight rate books?

A. No, sir.

Q. Do you, in your company office, have any rate cards, master rate cards?

A. Yes, sir.

Q. Who prepares those cards?

A. Our traffic manager.

Q. How and when does he prepare them?

A. We keep a current file of them, and they are corrected with every change made by the tariff.

Q. Will you tell us when they were prepared with relation to the freight rate books, as to whether they are prepared at a different time or at the same time?

A. Oh, they are prepared at a different time, unless we would happen to have a complete change in the freight rates, so that we would make out the changes on all the cards and reissue our rate books. The rate books are made from the master rate cards.

Q. Will you tell us, Mr. MacDonald, what you have found with respect to the shipping point at Mason City; does the railroad agent normally figure the rate, himself, before he signs the bill of lading?

A. We bill our shipments over the telephone
36574 about 3 o'clock in the afternoon. The bills of lading are then prepared and delivered to the railroad agent about 10 o'clock the next morning, and the railroad agent executes them, and we get them back. Now, I assume that the railroad agent, before he executes those bills of lading, either checks the rates that are shown thereon, or knows that they are correct, before he executes them.

Q. Mr. MacDonald, does the Northwestern States Portland Cement Company prepay the freight on any of its shipments?

A. Yes, sir.

36575 Q. On what part of the shipments do you do that?

A. At the present time we prepay it on all of them.

Trial Examiner Norwood: We are speaking of the time prior to July 2, 1937. Did you prepay the freight on shipments then?

Mr. Seeley: Perhaps, Your Honor, the witness—

Trial Examiner Norwood: Let him answer my question.

The Witness: Sir?

Trial Examiner Norwood: Did you prepay the freight on shipments prior to July 2, 1937?

The Witness: Only on a very little percentage of our shipments.

Trial Examiner Norwood: Does all of the testimony that you have been giving heretofore relate to the period prior to the date I mentioned?

The Witness: Yes, sir.

Trial Examiner Norwood: Go ahead.

The Witness: All except prepayment of freight on all our shipments.

Trial Examiner Norwood: And on the Good Friday bids.

The Witness: Yes, sir.

By Mr. Seeley:

Q. Well, prior to—we make that exception, Mr. MacDonald—prior to July 1, 1937, did you prepay freight on any part of your shipments?

36576 A. Just a very small percentage.

Q. We were talking about claims for shortage, Mr. MacDonald, and considering the period only, the period prior to July 1, 1937, where claims were made to the railroad, how were they made, in whose name were they made?

A. Northwestern States Portland Cement Company's.

36577 Q. Can you tell us why, Mr. MacDonald, you make out—I think you told us that you make out the bills of lading in your office.

A. Yes.

Q. Why?

A. A matter of convenience to ourselves.

Q. Now, a moment ago you told us that your 36578 freight rate books did not contain any routing. What has been your experience? Does the railroad agent check the routing?

A. Yes, sir.

Q. Are you speaking now of the agent at the shipping point or at the destination?

A. The agent at the shipping point.

Q. Have you had any experience as to whether the agent at the destination also checks the routing?

A. He would have no occasion to check the routing.

Q. I beg your pardon. I mean the rate.

A. The rate, oh, very infrequently we get an expense bill back from our customer where the railroad agent at destination has increased the rate, and our customer has paid it and deducted it from our invoice.

Q. Does the rate card that you told us about contain the routing?

36579 A. Yes, sir.

Q. How does it get on there?

A. It is put on there by our traffic manager from the tariffs.

Q. Do you have a rate card and routing to every destination that you may ship to, or only to those to which you are currently quoting?

A. We have a rate card and routing to every point

where we will ship to or hope to get a customer which comprises every destination in the States that we do business.

Q. Do you have rate cards for towns where there is no dealer?

A. I think we do in a few cases.

Q. Do your rate cards contain freight rates from so-called basing mills or non-basing mills?

A. Both.

Q. Is there any price on those cards?

A. No, sir.

Q. Where more than one carrier is involved, does your rate card show which routing will take the lowest rate?

A. Yes, sir.

Q. What have you found, do any of your customers request a routing which does not give the lowest rate?

A. I don't—

Trial Examiner Norwood: Now, why do you want to spend the time on that type of information?

Mr. Seeley: We are meeting here the evidence, 36580 Your Honor.

Trial Examiner Norwood: Well, you will have to show me its relevancy. I am not going to sit here and listen to any more of it.

Mr. Seeley: I have only a few more questions.

Trial Examiner Norwood: If they are like those I do not want to hear them.

Mr. Seeley: I will be glad to give Your Honor the references. I think it will become apparent in a moment just what we are meeting.

Trial Examiner Norwood: You do not have to meet evidence that does not go to the issues. If you will show me what you are going to bring out, and I think it is relevant here, I shall be glad to receive it.

By Mr. Seeley:

Q. Mr. MacDonald, in your sales department do you keep any record of your current prices?

A. Yes, sir.

36581 Do you keep cards with your current prices on them?

The Witness: Yes, sir.

36584 Q. Now, we have already mentioned three towns, Winthrop, Iowa, Rokeby, Nebr., and Charlesville, Minn. I will ask you the same question, Mr. MacDonald.

with respect to three other towns; Kloze, N. D., Manchester, Minn., and Edgely, N. D.

A. Yes, sir.

Mr. Seeley: I will ask to have these rate cards marked for identification.

(The cards were marked for identification "Respondents' Exhibits 2717-A to 2717-F.")

Mr. Seeley: And I will ask that these be marked. They should have a different number.

(The documents were marked for identification "Respondents' Exhibits 2718-A to 2718-D.")

By Mr. Seeley:

Q. Mr. MacDonald, will you kindly tell us, if you can, what these rate cards are, Respondents' Exhibit 2717-A to F, for identification, and will you tell us, when you are through with those, what these books are, Respondents' Exhibit 2718-A to D?

(3583) A. These are the original cards that came from our master rate file for the towns that have been mentioned.

Trial Examiner Norwood: They are the cards from which you made your quotations which are mentioned in the Commission's evidence?

The Witness: These are cards which we used to make our own prices from.

Mr. MacIntyre: They were not the quotations that were mentioned in the Commission's evidence, Your Honor. There were no quotations in issue there. They were this man's freight rates, and all of this evidence does not go to the point that the Commission's evidence went to. It is all beside the point, and irrelevant and immaterial.

Mr. Seeley: Perhaps Mr. MacIntyre will now tell us what the point was. We understood when the motions were made that he had a different point.

Mr. MacIntyre: Well, the point was to show errors in the freight rate books of The Cement Institute, and all of this testimony now offered does not go to that point at all, to show whether there are errors in The Cement Institute freight rate books.

Mr. Seeley: And I take it you are no longer charging this Respondent with collusion with respect to the freight rate books?

Mr. MacIntyre: This does not even meet that point.

36586 Mr. Brick: It has a pretty direct bearing on it, if Your Honor please. If this witness is not to be permitted to explain what rate information he uses and its source, and how it is made up, then I say it has a direct bearing.

Trial Examiner Norwood: He is discussing whether or not it went to this evidence here. It may go to something else.

Mr. Seeley: The charges.

Trial Examiner Norwood: I think he may show that these are the books that he is using there.

Mr. Brick: I think that if we have the concession from Mr. MacIntyre that there is no charge with respect to the Northwestern States Portland Cement Company having used the incorrect rates with respect to the points mentioned, we would not have to go into it. Now, do you make that concession? If you do, we can skip it.

Trial Examiner Norwood: He has already made that concession. He has said the issue was something else.

Mr. MacIntyre: As to that particular evidence.

Trial Examiner Norwood: But the freight rate books that he used as explanatory of his methods of pricing are relevant on another consideration.

Mr. Brick: I understand, but is there any disposition on the part of The Government that the North-
36587 western States Portland Cement Company used incorrect rates with regard to the points which were under discussion?

Mr. MacIntyre: If they used The Cement Institute freight rate books to which that particular testimony of the Commission's experts went, then we would contend it, but we understood from the witness here that he does not, in connection with this particular question, use The Cement Institute freight rate books. Therefore, all of this offer here for the last 17 minutes has been beside the point and clouding the issue in that particular respect.

Mr. Seeley: Do you now concede that this witness' company did not use the Institute books at all?

Mr. MacIntyre: He just told us that he uses one for one State, and he uses it for the purpose of checking, and so forth.

Mr. Brick: Your answer to that is that you do make such concession?

Mr. MacIntyre: No, I do not make any concession. I stand on the evidence.

Trial Examiner Norwood: Go ahead. You object to the proffer?

Mr. MacIntyre: You ask whether there is an objection to the offer?

Trial Examiner Norwood: These are offered now.
36588 Do you object to them or not?

Mr. MacIntyre: We certainly do.

The offer of Respondents' Exhibit 2717-A to F is objected to, on the ground that they are irrelevant and immaterial. They are also incompetent and have no relation to the issue, as such.

As to the offer of Respondents' Exhibit 2718-A, B, C, and D, we consider that they are cumulative and immaterial.

Trial Examiner Norwood: Exhibit 2718 are the freight rate books that you made up in your own office; is that right?

The Witness: Yes, sir.

Trial Examiner Norwood: And you use them all the time?

The Witness: Yes, sir.

Trial Examiner Norwood: And these cards are made out from those books?

The Witness: No, sir; the books are made out from those cards.

Trial Examiner Norwood: From what are these cards made up?

The Witness: They are made up from the freight tariff.

Trial Examiner Norwood: You are offering those
36589 to show that the rates on those are different from The Cement Institute books?

Mr. Brick: No, sir.

Mr. Seeley: No, sir.

Trial Examiner Norwood: What are you offering them to show?

Mr. Brick: This is off the record, if Your Honor please.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Mr. Brick: This offer, if Your Honor please, is for the purpose of meeting the evidence shown to the effect that this company used incorrect rates with respect to the

points we have been discussing. It is our position that the company did not use incorrect rates, that they used the rates appearing on those cards, or in those books, as part of the pending offer, and we claim that those are correct, and that is the direct evidence we contend, which rebuts the claim made by the Commission.

Trial Examiner Norwood: And they claim that they used the incorrect rates which were in the Institute books; is that right?

Mr. Brick: Yes, yes. And we say we not only did not use the Institute books, but we used our rates, and our rates are correct. This is the proof of it.

36590 Trial Examiner Norwood: Do these correspond to the Institute book rates, or not?

Mr. MacIntyre: If Your Honor please, there is no evidence put into the case by the Commission to the effect that this particular company used the particular rates in The Cement Institute books that were under discussion at the points in the record referred to by the counsel, and, therefore, used those incorrect rates. Of course, the witness had correct rates if he did, as the testimony shows, used rates from the tariff to those particular points, and not rates from The Cement Institute freight rate books, and this is merely an effort to try to show that the tariff rates are correct. Well, there is nothing in issue about the tariff rates being correct. The official tariffs of the railroads, we concede that they are correct, and we always have contended it to be the case.

Trial Examiner Norwood: Now, do these reflect any rates that were shown on any bids whatsoever?

Mr. Brick: Not to my knowledge.

Trial Examiner Norwood: You are offering this as some instance where they used correct rates?

Mr. Brick: No.

Mr. Seeley: No.

Mr. Brick: No. We are offering them to show
36591 that they used correct rates for the purpose of meeting the Government's charge that with respect to those points they used incorrect rates.

Mr. MacIntyre: And they would be if they used The Cement Institute books Now, you proved that they used The Cement Institute books and still used correct rates; if you prove that you would be meeting the issue here,

but you are not doing that. You are going around the bush and showing something else.

Trial Examiner Norwood: Wouldn't this throw some light on the situation by comparing these with the rates in the Institute books?

Mr. Brick: That is simple, Judge.

Mr. Paulson: The evidence is there that it is an incorrect rate.

Mr. Brick: There was an incorrect rate in the books with respect to these books, and a correction sheet came out later, about a month or so later correcting it. Now, during the interim that the person did use the Institute books, for that short period of time before the error was discovered, they might have been using incorrect rates if they did not check the tariff.

Now, here is a case where the man does not use the Institute books, he uses his own rates and his own rates, we claim, are correct.

36592 Trial Examiner Norwood: Who claimed they were not correct?

Mr. Brick: The Government claims this company has been using incorrect rates.

Mr. MacIntyre: We concede that if he uses the tariff rates, as he testified, why, that they are correct. In fact, we would contend that they are correct rates if they are from the official tariffs, as he testified.

Trial Examiner Norwood: Well, wouldn't those corroborate him in the matter?

Mr. Brick: That is what they are offered for.

Mr. MacIntyre: That is not even in issue. If he is using the rates, of course we would contend that they are correct. There is nothing to meet.

Trial Examiner Norwood: He has testified he checked his quotation from the Institute books, did he not?

Mr. Brick: No. He said to some extent that his traffic man might use the Institute books for the purpose of checking some of the rates.

Mr. MacIntyre: Now, the point as I see it, if Your Honor please, is just this: If the cards have any relevancy at all to the issue, whether the rates in The Cement Institute books to those particular points were erroneous; if they have any relevancy they would be for the purpose of attempting to show that they are correct by

36593 comparing them with these, but they would be incompetent for that purpose because if you are

going to show that they are correct, then you have to go back to the original tariffs.

Trial Examiner Norwood: Haven't you charged that all of these Respondents follow the Institute books?

Mr. Seeley: Right or wrong.

Trial Examiner Norwood: Even though it is wrong, and that this is one of the Respondents who did it. Now, here, he is showing you his cards to show you, to cover a period during which there was an error in the Institute books, that he followed the correct rate here. Now, will he testify that he made quotations on those during that time?

Mr. Brick: He has already done so. It is in the record, and this is the proof he did.

Mr. MacIntyre: That does not disprove any showing that the rates in The Cement Institute books are erroneous.

Trial Examiner Norwood: The objection is overruled.

The exhibits are received as marked.

36594 By Mr. Seeley:

Q. Mr. MacDonald, can you tell us what these papers, Respondents' Exhibits 2719-A and B, for identification, are?

A. They are corrections to our rate books. Is that sufficient?

Trial Examiner Norwood: Corrections to the books which have just been received in evidence?

The Witness: Yes, sir.

Trial Examiner Norwood: Do you offer those?

Mr. Seeley: I believe the Counsel for the Commission offered them. No, I do not offer them because they are not part of our proof.

Mr. MacIntyre: I feel that my objection, though, would have to be made on an additional ground, an additional ground to the books, since that they are incomplete now.

Trial Examiner Norwood: I think that you must offer those.

Mr. Seeley: They do not cover the period under review on these cards.

Mr. MacIntyre: Well, the books are incomplete.

36595 Trial Examiner Norwood: Well, give the Commission's Counsel a copy of those, duplicates.

Mr. MacIntyre: Those that are marked, if we may have those.

Trial Examiner Norwood: He may put them in if he wants to.

Mr. MacIntyre: May I have those, Mr. Seeley, that have been marked, since they are already identified? Isn't that a duplicate?

Trial Examiner Norwood: Now, I think we cannot go any further with this hearing at this time. I want to put a little statement on the record, so I will proceed.

I want to say the state of the record is such as to render it necessary for us to consider what further time will be reasonable to allot to the groups of Respondents represented by the firm of Donovan, Leisure, Newton & Lumbard, and the various individual Respondents represented by other counsel.

I have heretofore requested on the record that counsel for these other Respondents notify me of the estimated number of witnesses they wish to offer in this proceeding and of the estimated time they desired for this purpose. I repeat this request with a notice that if it is not complied with such Respondents must hold themselves in readiness to produce their witnesses at any time said Respond-
36396 ents may be called on without further notice.

This does not apply to those who have heretofore complied with this Examiner's previous request, and have produced or arranged for the production of their special evidence.

I also request the firm of Donovan, Leisure, Newton & Lumbard to give me an estimate of the number of witnesses they have yet to offer, and of the time they think will be required.

These hearings cannot continue indefinitely, and I need this information in order to make the necessary plans to meet all reasonable requirements.

36597 Washington, D. C.,
April 16, 1940.

36598 B. A. MacDONALD thereupon resumed the stand and testified further as follows:

Direct Examination (Continued).

By Mr. Seeley:

Q. Has your company ever delivered a shipment to a railroad with the route designated but without the rate entered?

A. Not to my knowledge.

36599 Q. Has your company ever delivered any shipments to the railroad on which the rate was entered but no route was specified?

A. Not to my knowledge.

Q. Ordinarily, in the course of your business, do you select the route in making shipments?

A. We do.

Q. Will you tell us what practice you consider primarily in routing your cement shipments?

A. First, to protect the rates; secondly, to furnish the service.

Q. In that connection, are you interested in the train schedules?

A. Yes, sir.

36600 Q. That is correct.

Do you receive advice from day to day which shows the latest changes made in freight rates on cement?

Mr. MacIntyre: I object to further detail of this character. I cannot see that it is of any benefit to the Respondents toward meeting any issue in the case.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: What relevancy has that?

Mr. Seeley: Well, it is just a preliminary question and there is only one other question to follow it.

Trial Examiner Norwood: Well, I think I will have to know what the question is.

Mr. Seeley: It has to do with the charge that this Respondent, and other Respondents, do not use the current

rate where changes in rate occur until they have received correction notices from The Cement Institute.

Trial Examiner Norwood: Well, can't you direct your question to the use rather than to the method of his getting information about rates?

Mr. Seeley: Well, that was a foundation question, Your Honor.

36601 Mr. MacIntyre: I thought we had several foundation questions over the last half hour.

Trial Examiner Norwood: I do not see how it is relevant for him to tell us the manner in which he secures this from the railroad.

The objection is sustained.

Mr. Seeley: I offer to prove that this Respondent receives advice from time to time which shows the latest changes made in the freight rates on cement in the territory in which he does business.

By Mr. Seeley:

Q. Mr. MacDonald, when you receive notices of changes in the freight rates in your territory, do you use that information upon receipt, or do you await the issuance of correction sheets by The Cement Institute?

A. Well, we correct our freight rate book as soon as we get the tariffs from the railroad company, but, of course, now, those rates may not be effective at the time we get the tariffs. They have to give 30 days' notice.

Q. I want to mention a group of other towns here which have been discussed in this record and just ask you one question with respect to those points. The towns are: Brevator Junction, Minn.; Rush Lake, Minn.; Plainview, Mo.; Rutland, Nebr.; and Hawks, N. M.; and the following towns in Oklahoma: Porter, Vinita, and Wayside.

36602 Now, as to any of those points, Mr. MacDonald, has the Northwestern States Portland Cement Company carried any rate cards or prepared any freight rate compilations or rates to those destination points?

A. I think we had cards for one or two of those towns, not all of them.

Trial Examiner Norwood: Well, now, they had general rates, and those rates were different from the Institute book; is that right?

The Witness: On some of those points; yes, sir. I believe that is correct.

Trial Examiner Norwood: And you disregarded the rates in the Institute book, did you?

36603 The Witness: Yes, sir.

Trial Examiner Norwood: And you used the correct rate?

The Witness: Yes, sir.

Trial Examiner Norwood: Did that throw your company's prices out of line with some other competitor? Did it put you under them, or not?

The Witness: No, sir.

Mr. Brick: It is natural at that point, Your Honor, that the record has not shown that the particular rates which the Government alleges were inaccurate were actually used. As a matter of fact, they are all small points. All they do is to point out that for a period of a few months the rates do not correspond with the proper tariffs. They did not prove any sales having been made at prices arrived at by the use of the inaccurate rates.

Trial Examiner Norwood: Then, the only issue there seems to be the accuracy or inaccuracy of the rate books, and this testimony here is entirely and completely irrelevant.

Mr. MacIntyre: That was my objection last Friday. It does not meet the evidence and the purpose for which that evidence was offered.

Trial Examiner Norwood: The charge is that you used the Institute rates as against those.

36604 Mr. Brick: If the Government is willing to concede that the Northwestern States Company used the accurate freight rates and did not use any of the inaccurate ones, to which the Government made reference in the course of its case, why, then, we have nothing to prove, and would not concede that.

Trial Examiner Norwood: That is entirely beside the point. If appears now from your own statement that you have nothing to meet, and I am going to exclude further evidence of this nature and to these particular prices.

Mr. Brick: You mean by that that if the Government charges that we have used inaccurate rates we haven't got the right to show that we have used accurate rates and that the Government is wrong?

Trial Examiner Norwood: I think my statement is clear.

Proceed with the examination.

Mr. Seeley: May I point out, Your Honor, that if the Government has not proved in connection with its offer to prove that The Cement Institute books contained an inaccurate rate on a certain date, if it has not proved any sales during that period at those points, then the motions to strike that testimony should have been allowed, and I now renew our motion.

Trial Examiner Norwood: If it is not proved you 36605 do not have to meet it.

Mr. Seeley: Well, is it your—

Trial Examiner Norwood: If it is not proved, there is nothing to strike.

Go ahead.

By Mr. Seeley:

Q. Mr. MacDonald, was there any difference in your practice of giving freight rate books to your salesmen during the N.R.A. period?

A. No, sir.

Mr. Seeley: I ask to have marked for identification the following cards.

Give those a number, please.

Trial Examiner Norwood: Now, before we spend any time on that, please describe those cards to me.

Mr. Seeley: These, Your Honor—shall we let the witness describe them?

Trial Examiner Norwood: No. I want to know what they are, what you want to show by them.

Mr. Seeley: These are (approaching the Trial Examiner)—

Trial Examiner Norwood: No. I want you to discuss for the record what they are.

Mr. Seeley: Well, I will, Your Honor.

Trial Examiner Norwood: What you want to show 36606 by them.

Mr. Seeley: These are master quotation cards which are used by this company, and they show the prices which this company used at those points during the period under review and the changes in those prices.

Trial Examiner Norwood: Now, as I understand it, there is no testimony to the effect that you used different prices.

Mr. Brick: Different from what, if Your Honor please?

Trial Examiner Norwood: From what are on these cards.

Mr. Brick: That is true. Those are the prices which this company quoted at the times indicated on the cards for the points indicated.

Trial Examiner Norwood: Well, do they meet anything that is in the record?

Mr. MacIntyre: Not that I know of.

Mr. Brick: I think that as far as defense is concerned, you are a better judge of that than Mr. MacIntyre.

Trial Examiner Norwood: Mark one of them to show what they are, and I am not going to have you mark any others.

Mr. Seeley: Can we mark the set and give it a number?

36607 Mr. Brick: He said one.

Trial Examiner Norwood: Yes, one number, consisting of—no, I think one card will be enough to mark, and state for the record how many you have like it.

Mr. Seeley: Will you give it a number, please.

Mr. Brick: Aren't there two out of each of the States in which the company does business, Judge?

Trial Examiner Norwood: Mark one card and then make your offer of proof, and state the number of cards.

(The card was marked for identification "Respondents' Exhibit 2720-A, 2720-B, 2720-C, and 2720-D.")

By Mr. Seeley:

Q. Mr. MacDonald, showing you Respondents' Exhibit, for identification, No. 2720, can you tell us what this is, the source of it?

A. It is from our files.

Q. Well, will you just describe it, what kind of record is it?

A. It is a record of prices that we quoted this particular customer at this point since 1925, since January 12, 1925, up to date.

(Mr. MacIntyre is standing near the witness looking at the paper referred to.)

Trial Examiner Norwood: Have you offered that?

36608 Mr. Brick: No, but Mr. MacIntyre can look at it.

Trial Examiner Norwood: Proceed.

Mr. Seeley: I offer it in evidence (handing the document to Mr. MacIntyre).

Mr. MacIntyre: I object to it. It is irrelevant and immaterial and cumulative.

Trial Examiner Norwood: The objection is sustained. It is rejected as irrelevant and time consuming.

By Mr. Seeley:

Q. Mr. MacDonald, do you in your company keep quotation cards of the kind I have just handed you for all the dealers that you are currently quoting to?

A. Yes, sir.

Q. And do you keep such cards for dealers that you are not quoting currently?

A. No.

Q. I think you told us the other day that your dealers request routing on occasion.

A. Very rarely.

Q. Where they have requested routings do they appear on these quotation cards?

A. Yes, sir.

Q. In cases where you are not quoting a dealer currently, do you carry rate cards for the destination?

A. If it is within our sales territory.

36609 Q. Coming to a new subject, Mr. MacDonald: What are the terms of sale of the Northwestern States Portland Cement Company?

A. Thirty days net, 10 cents a barrel for cash 15 days from date of shipment.

Q. Did your company make any change in its terms of sales since you have been with the company?

A. I think the discount period was extended five days, if I remember correctly.

Q. Well, did you ever have and allow a so-called trade discount?

A. We allowed for a period of time an extra dealer discount.

Q. To your knowledge, did any one in the cement industry ever attempt to bring the Northwestern States Portland Cement Company over to the Lehigh selling plan? I refer to Commission's Exhibit 1131.

A. Could you give me a little further identification on what that plan was? Well, nobody has ever attempted to change our selling method.

Q. I will show you Commission's Exhibit No. 1131 (handing the document to the witness).

A. Is this the Lehigh plan where they withheld a certain dealer discount and paid it at the end of the year?

Q. I think it is.

A. Nobody ever attempted to have us adopt that
36610 plan. We never adopted it.

Q. Well, what, if any, sales policy did you have at that time,—at the period referred to in that exhibit?

A. I believe that was the period of time when we had the dealer discount, but that was deductible at the time the invoice was paid.

Q. Well, what was the attitude, if you recall, of your company at that time towards this so-called Lehigh sales plan?

A. We did not think much of it.

Q. Well, what has been the policy, generally, of your company in regard to the so-called dealers' differentials?

A. We have that to be determined by the dealer.

Q. Have you ever had any conferences with any of your competitors regarding terms of sale or discount?

A. No, sir.

Q. Did you consult any competitors concerning the Lehigh sales policy?

A. No, sir.

Q. Did this so-called Lehigh sales plan have any effect upon the classes of trade that your company sold direct?

A. No, sir.

Q. As to the changes which you have made in your policy as to terms of sale, will you tell us, briefly, have they been more favorable or less favorable to your dealers?

A. Well, our terms—the net result of our selling
36611 policy over all the years that I have been with the company have been so uniform that there has been no substantial change.

36612 Q. Finally, Mr. MacDonald, has the Northwestern States Portland Cement Company ever been a party to any understanding or agreement as to the terms of sale or discount that were used?

A. No, sir.

Q. Does the Northwestern States Portland Cement Company ship any cement in bulk?

A. Yes, sir.

Q. Well, roughly, can you tell us what part of your shipments move in bulk?

A. Well, they varied substantially. I could not give you an average figure on that out of my memory right now.

Q. Has the Northwestern States Portland Cement Company ever declined to ship in bulk when the customer desired?

A. No, sir.

Q. In the territory in which you do business, Mr. MacDonald, have you found any cement being sold at prices that did not accord with the going market price as you found it?

36613 A. Do you mean by that these secret cuts?

Q. Yes.

A. Yes, sir.

Q. Has the Northwestern States Portland Cement Company made any such prices?

A. Yes, sir.

Q. Well, now, reviewing the period prior to the date of the complaint in this proceeding, has the amount of cement that you found sold on such terms been consequential or inconsequential?

A. It has been consequential.

By Mr. Seeley:

Q. Well, as to these so-called secret prices which
36614 you have found, what has been your experience, have they been sufficient to deflect the business to any of your competitors?

A. Yes, sir.

Q. And have you or have you not gotten business yourself which you otherwise would not have gotten by such prices?

A. Well, we have met that type of price competition. Now, as to whether the price we met was the exact measure necessary to get that business, or not, is more or less speculative, but we have met that type of price competition.

By Mr. Seeley:

Q. And in meeting that type of price competition, do I understand that you were successful in getting the business?

A. We have got business under that method.

Q. Do you know, Mr. MacDonald, of any so-called reciprocity between any other cement producers in your area?

A. Not so far as it affects us.

Q. Has the Northwestern States Portland Ce-
36615 ment Company, to your knowledge, ever been coerced by any of its competitors?

A. No, sir.

36617 Q. Mr. MacDonald, during the period of the N. R. A. Cement Code was it your practice to notify your salesmen as to changes in prices?

A. Yes, sir.

Q. Showing you Commission's Exhibit No. 2193, can you tell us whether that is one of the notifications that you have referred to?

A. Yes, sir.

Q. Referring to the date at the top of this exhibit, and the other dates below, what was the relationship, if any, between these dates at that time? I mean, how did you, in issuing these notices of changes in your quotations,—what was your practice?

A. Well, this is during the Code period, and apparently we were notified by the Code of these changes in prices that were about to take effect.

Q. And these dates opposite the figures in the
36618 lefthand column are the effective dates or not the effective dates as you were notified?

A. They were the dates that they were going to be made effective.

Q. According to information you received?

A. Yes, sir.

Q. Showing you Commission's Exhibit No. 2194, do you recognize this paper?

A. Yes, sir.

Q. It appears from this paper, Mr. MacDonald, that your company was notified by one of its salesmen concerning prices from competitors found at these destinations mentioned. Can you tell us whether you had any other advices concerning these points at or prior to that time?

A. I presume we did.

Q. You say you presume you did. What makes you believe you did?

A. We had already sent out our quotations.

36619 Q. Mr. MacDonald, coming to a new subject, did the Northwestern States Portland Cement Company submit any bid on a letting of the Illinois Highway Department on or about January 6, 1932?

A. I presume we probably did.

36620 The witness recognized and identified Resp. Ex. 2722 and 2723 as the work sheets Northwestern States used in preparing its bids to the State of Illinois. It is the highway letting of January 6, 1932.

Examination on Voir Dire by Mr. MacIntyre.

Q. Mr. MacDonald, can you tell us where the information was received that appears on these work sheets and that you used in calculating the prices that you submit ed in those bids?

A. We received the information as to the point where the State was taking bids out from the State, and also on the quantities that they were taking business at that point. Is that what you want to know?

Q. Well, where did you get the information as to how that price was based, say, on LaSalle, Hannibal, Humboldt, and other basing points?

A. Well, there is no Humboldt here, but we
36621 figured the price there, and then figured it back to the mill. That made the price plus their freight.

Q. You used the lowest combination and the basing point price plus railroad freight to the destination that the State wanted to bid for: is that right?

A. Right.

Q. In each instance?

A. Right.

Trial Examiner Norwood: Is that a case where you got the freight directly from the railroad?

The Witness: Well, we took the freight out of our own rate books; yes, sir; from the tariffs.

Trial Examiner Norwood: Not from the Institute book?

The Witness: No, sir.

Trial Examiner Norwood: Were they different from the Institute rates?

The Witness: I don't know.

Trial Examiner Norwood: Go ahead.

By Mr. MacIntyre:

Q. You did not have information from the field from each one of the points on which you bid there, did you?

A. I wouldn't think so; no, sir.

Q. It was a matter of calculation?

A. Yes, sir.

Q. Using the basing point method in calculating the price?

36622 A. Right.

(RESP. EXS. 2722 and 2723 were offered and received in evidence.)

Direct Examination By Mr. Seeley (Continued).

Q. Mr. MacDonald, will you look at those two pages, Respondents' exhibits that you have. Tell us whether in bidding on the requirements covered by that letting, which apply to Commission's Exhibit 1844—did the Northwestern States Portland Cement Company hold itself to any net return?

A. Any minimum net, you mean?

Q. Yes.

A. Yes, sir.

Q. And what was that, if you know?

A. Eighty cents, I believe.

Trial Examiner Norwood: In other words, if your net came below 80, you did not bid?

The Witness: We either did not bid or we bid a higher price, so we did not obligate ourselves to take any
36623 business below 80 cents net.

By Mr. Seeley:

Q. Does your company ordinarily solicit business in Illinois, Mr. MacDonald?

A. No, sir.

Q. How does it happen that you bid on this occasion?

A. In the hopes that we might succeed in getting part of the business.

Q. Did the Northwestern States Portland Cement Company bid on any letting covering requirements of the Illinois Highway Department in the month of March, 1936? I refer to Commission's Exhibits 1878 and 2195.

A. We probably did.

The witness identified Resp. Ex. 2724-A to F as the work sheets prepared to submit bids to the Illinois
36624 Highway Department. They pertain to the requirements to which counsel has directed his attention.

Mr. Seeley: I withdraw the offer, Your Honor.
36625 Trial Examiner Norwood: All right.

Mr. Seeley: If Commission's Counsel have no objection, I will refer to this as Commission's Exhibit 2195.

Trial Examiner Norwood: All right.

By Mr. Seeley:

Q. Mr. MacDonald, looking at those papers, can you

tell us whether in bidding on that invitation your company bid at all points called for in the invitation?

A. I could not tell from this document, but from memory I would say we did not.

Q. Well, do you recall what guide, if any, you used in deciding at what point you would bid?

A. I believe we observed a certain price minimum.

Q. And what was your reason for that?

A. We did not care to take the business below the minimum that we used.

Q. Mr. MacDonald, a moment ago Mr. MacIntyre referred you to the mill base figures which you used in making up the—your company used in making up these work sheets. You told us a moment ago with reference to Commission's Exhibit 2192 that you keep currently in your office a record of the current mill bases that you find in effect in your territory.

Was the source of the information you used in preparing these work sheets the same or different from the source to which you referred in connection with Commission's Exhibit 2192?

36626 A. The same.

Q. Well, has the Northwestern States Portland Cement Company ever consulted any of its competitors in connection with bidding on any of these highway lettings?

A. No, sir.

Q. Or any other bids which you submitted?

A. No, sir.

Q. Were you interviewed, Mr. MacDonald, by an investigator named Royal?

A. Yes, sir.

Mr. Seeley: I refer, Mr. MacIntyre, to record pages 12520 and 12521.

By Mr. Seeley:

Q. Tell us, Mr. MacDonald, did you or not tell Mr. Royal that your company refused to bid f.o.b. mill to the State of Illinois in order not to disrupt the price situation?

36627 A. No, sir.

By Mr. Seeley:

Q. Tell us, Mr. MacDonald, did your company on any of these bids to the highway department of the State of Illinois bid f.o.b. mill?

A. No, sir.

Q. At the time referred to at which you told us you were interviewed by an investigator named Royal, did you tell Mr. Royal why you did not bid f.o.b. mill?

A. No, sir.

Q. Now, on the bids which we have referred to, did you at any of the points at which you bid, bid prices that were other than your current market prices?

A. No, sir. Maybe for—just a minute. I want to withdraw that. Any point where we bid—there may have been some bids there where we bid above what we consider the current market price in that area, but we were not soliciting business there, quoting there as a regular thing.

36632 Q. Mr. MacDonald, will you tell us prior to 1926 did your company have any inquiries for cement from the State of South Dakota at any time?

A. Not to my recollection; no, sir.

Q. The record shows, I think, that you told us that you withdrew from the State of South Dakota, after, after some time subsequent to the construction of the South Dakota mill at Rapid City. Can you tell us, if you know, the reason why?

A. Well, the reason was we were forced out.

Q. And why were you forced out?

A. Well, when the State plant was under construction there, there was a great deal of consideration given to the method of marketing which the State plant would use when they started to sell their cement. The dealers in the State of South Dakota, many of whom we had been selling, good customers of ours, were very much fearful that the State was going to ignore the dealers and market their cement direct to the consumers, so when the State started to merchandise their cement they adopted our policy precisely in selling through the dealers, and on prices, too, and the dealers out there in order to support the State
36633 in that policy bought their cement so that the State would continue to sell through them.

Trial Examiner Norwood: Did they meet your competitive prices, or go under it?

The Witness: They met our prices precisely, Your Honor, and our marketing conditions, too; apparently, as far as we could tell, they adopted our whole marketing set-up, prices, methods, and everything.

Trial Examiner Norwood: Terms and policies?

The Witness: Yes, sir.

By Mr. Seeley:

Q. And in issuing quotations in that area, did your company ever establish any so-called reduction in the mill base at Rapid City?

A. No, sir.

Cross-Examination by Mr. MacIntyre.

Q. Mr. MacDonald, in your stipulated testimony you have given a date of a change in the charter of your company. Can you tell me whether or not there was a change in the officers at that time, or in the members of the board of directors?

A. Do you mean at the time we changed our corporate set-up from a West Virginia corporation to an Iowa corporation? No substantial change.

30634 Q. What changes were there in officers or directors at that time, can you tell us?

A. None at that particular date in April that we actually made the turn-over.

Q. In other words, all the officers continued and all the directors continued just as they had previous to the change in charter?

A. On that particular individual date; that is correct.

Q. Now, was there any change in the stockholders as of that date?

A. Yes, sir.

Q. And what was the change? What were the stockholders changes?

A. The very minor percentage, I do not recall the exact percentage now; around 1 percent, or probably less, that elected to not take the stock, not change their stock from the West Virginia corporation to the Iowa corporation, a very small percentage.

Q. But 99 percent of them did?

A. I am not testifying to that exact percentage, but approximately.

Q. Approximately?

A. Yes, sir.

Q. So there was more change in form than in substance as to the management as well as the ownership; isn't that correct?

30635 A. That is absolutely all that was intended to be done when we made the change.

Q. Now, at lines 8 and 9, page 36482, you stated that you checked some points in the field and then determined from that checking what the basing points are that applied in the territory.

I will now ask you how many points that you so checked before you arrived at your determination as to the application of a basing-point price in the territory?

A. The variation that would occur in the different checks at the different times that we changed our prices would be very substantial. We might only have to check fifteen or twenty points, and we might come in contact with a hundred. I could not state any definite number of points. The type of the change would determine it to a large extent.

Q. And you continue checking after you have issued your quotations, as is shown by an exhibit called to your attention this morning; isn't that correct?

A. We are always checking.

Q. So your checking is not necessarily for the purpose of determining whether—that is, in further confirmation of a price change that you have learned about and which you have already met, but as to whether or not people are continuing to follow your price; isn't that correct?

36636 A. I will do my best to answer it.

It is our every-day practice to check all competitive prices that we find.

By Mr. MacIntyre:

Q. But you do not continue that check for the purpose of determining how many people have made the change, so that you may in turn follow it, because you have already followed it? You do that for the purpose of confirming the fact that they have gone along with the price that you met, isn't that correct?

36637 A. We make this continual check of prices in our territory that we are soliciting, which is routine with us to determine whether we are competitive at each of the points we are trying to sell constantly; it is a constant thing.

By Mr. MacIntyre:

Q. And largely for the purpose of satisfying yourself; that is, confirming the fact that your competitors are following the price which they had previously announced; is that correct?

A. I would not say all our competitors. We are just interested in meeting the lowest price we find in the field. There may be some other competitors not meeting that. I could not say.

Q. Isn't that checking for the purpose I have stated, Mr. MacDonald?

36638 A. The checking is for the purpose I have stated, and that is to enable us to be competitive at the points at which we are soliciting business.

Q. Well, do you deny the purpose I have stated is one of the purposes for which you check?

Mr. Seeley: Your Honor, that has been answered two or three times.

Trial Examiner Norwood: Isn't that the way you determine whether or not you are competitive, whether your competitors are following you at that point?

The Witness: I do not know that they follow us, all of them, Your Honor.

Trial Examiner Norwood: Do you check that to find out?

The Witness: Sir? No, no, we check to see whether we are competitive or not, whether we are meeting the lowest price at the point where we are soliciting business.

Trial Examiner Norwood: Whether you are competitive or not depends on what your competitors are charging at that point.

The Witness: We are just interested in meeting the lowest price. Now, some of our competitors may be as low as we are, and some may not. We do not check for that.

Trial Examiner Norwood: But to determine whether or not you are competitive you have to know what

36639 he is charging at that point.

The Witness: What is the lowest price made by individual competitors, not by all of them.

Trial Examiner Norwood: So you check to find that out?

The Witness: Yes, sir; constantly, constantly.

By Mr. MacIntyre:

Q. Well, let's use an example, Mr. MacDonald: Say your salesman checked yesterday in Des Moines, Iowa, and found a price that was quoted by Penn-Dixie. You had him to check with the same dealer next week. Isn't it for the purpose of determining whether Penn-Dixie is continuing with that price that they had announced last week, or this week?

A. It is for the purpose of ascertaining if we are meeting the lowest price that is quoted by anyone in the market, not only by Penn-Dixie, but anyone.

Q. Isn't one of the purposes that that I have just stated?

A. We would not restrict it to any one competitor or any one price.

Q. Well, I used that as an illustration, it would apply to one and all competitors, wouldn't it?

A. It would apply to the customers, or the competitor that is meeting the lowest price in that market a of the day we are checking.

Q. And if that is Penn-Dixie, it would apply to
36640 it in the same manner I have stated?

A. The same manner as any other company who might be quoting in that market.

Q. You would confirm whether or not they were continuing with the price that they quoted, say, yesterday or last week?

A. If that was the lowest price available in that market; if it was a higher price we would not be concerned.

Trial Examiner Norwood: You want to find out who is the lowest and what he charges?

The Witness: That is right.

By Mr. MacIntyre:

Q. And the next day you would have a check made for the purpose of determining whether or not he is continuing with that price; is that correct?

A. If that happened to be the lowest price we could find available there, or if it is anybody else.

Trial Examiner Norwood: I think he has answered that.

By Mr. MacIntyre:

Q. Mr. MacDonald, in your stipulated testimony, page 36487, line 9, you stated that you opposed diversions of cement in transit. Will you tell us why?

A. We only oppose diversions of cement in transit where it may interfere with us getting the market prices that we should get for that cement at its ultimate destination.

36641 Q. But would you receive any less mill net if it were diverted in transit from what had already been understood that you would receive?

A. That is the only reason why we object to diversions.

Q. It is not because you would receive any less on that particular shipment, though, is it?

A. Yes, it is, because we would receive less on that particular shipment that we objected to, that is the reason we do object to it.

Q. How would you receive less on a shipment that is diverted in transit—that is, an amount less than the amount you expected to receive on your particular shipment when it started from your mill, Mr. MacDonald?

A. Maybe you and I got off a little on the wrong track.

Q. I think maybe we did.

A. If we would sell a car of cement to a point in Northern Minnesota at less than our maximum mill net, where the price was fixed by competition from, say, Steelton, and that car was diverted to, say, Minneapolis, at a point where we would receive our maximum mill net, and the dealer in transmitting to their car would pay on the basis of the price of the destination that the car was ordered to, we would receive less for the cement that was diverted in Minneapolis than we would have if we had to sold to Minneapolis in the first place.

Q. Irrespective of where he diverts it to, you
36642 receive no less than your contract with him calls for on a particular shipment, don't you?

A. That is right. Yes, sir; you are right.

Q. In other words, it makes no difference as to that contract with him; you get just as much money?

A. That is right.

Q. I believe your testimony is to the effect that you do not truck cement from your plants. Will you tell us why?

A. We have never had any demand for it. We did truck a little in 1920, Mr. MacIntyre—I believe in 1922, when the railroads were so short of cars that we could not get the cars, and we did truck a little, and since the railroad cars have been available we have not trucked.

Q. Your testimony is that there is no demand?

A. At the present time, and has not been since cars have been available. That is my testimony; yes, sir.

Q. Is that true during 1936 and 1937, just before this case was undertaken?

A. Yes, sir.

Q. Mr. MacDonald, can you point to any terms and con-

ditions of your sales that are different from those set forth in the Compendium of the Cement Institute, which is in this record as Commission's Exhibit 561?

A. You mean terms and conditions of sale or selling policies?

36643 Q. Well, both, terms and conditions of sales and selling policies.

A. Well, as far as the terms and conditions, they appear on our selling contracts—sales contracts. I haven't a very definite recollection of that Compendium, but I think they are substantially the same.

As far as our sales policies are concerned, we never adopted the Compendium, and I believe that there are some changes in our policies, and were at the time, that we never adopted to conform to the Compendium.

Q. Were your sales terms and conditions and sales policies any different than your competitors during the period of the Code?

A. Yes, sir.

Q. In what respect?

A. Well, I have in mind principally in respect to selling these bridge and culvert works that were outside the city. We never quoted them direct.

Q. Well, that particular provision of the Code was in force only 30 days. You are talking about that 30 days or subsequent?

A. I am talking about the period when Article XI was in force.

Q. Any other respects that your sales policies differed from those of your competitors, as outlined in Commission's Exhibit 557; that is the N.R.A. Code.

36644 A. You mean were they different from our competitors or from the Code?

Q. Well, from those expressed in the Code.

A. Well, there are one or two other items I recall where they are different.

Q. What are they?

A. We had no inflexible rule for selling cement products plants or ready-mix plants. We sold to the dealer and direct, both. I believe the Code provided that they had to be sold direct.

Q. And you did that during the 30-day period in which Article XI in the Code was in effect?

A. I do not recall that 30-day period that you are talk-

ing about, Mr. MacIntyre, but during the time when Article XI was in effect.

Q. Any other respects in which your terms and conditions of sales and sales policy were different from those expressed in the Code?

A. I do not recall the provisions of the Code accurately enough to recall any others about this time.

Q. Earlier this morning, Mr. MacDonald, you stated that a consequential part of the business with which you are concerned was involved in the so-called secret price cutting. Do you recall your testimony on that point?

A. Yes, sir.

36645 Q. What did you mean by the word "consequential" when you used it in your testimony?

A. Substantial tonnage that we were soliciting.

Q. What percent of your total does that involve?

A. The question is so general, Mr. MacIntyre, I couldn't give you—it has been—I have in mind in giving that testimony principally the requirements of the State of Iowa for their highway construction work.

Q. When was that?

A. It has been a constant thing in the last—ever since the State discontinued buying, which, I think, was about 1933.

Q. Out of your total business, how much was so involved?

A. I say, we have sold on that type of work all the way from, oh, I will say a hundred thousand barrels to probably near eight hundred thousand barrels.

Q. Well, in any one year where this secret price cutting that you talk about was involved, what was the amount that you sold out of your total on such business?

A. The last year we only sold 35,000 barrels.

Q. I am talking about the period previous to the issuance of the complaint in this case, Mr. MacDonald; that is, prior to July, 1937.

A. Well, as I said, Mr. MacIntyre, we had been supplying all the way from, oh, two and three hundred thousand barrels to one year when we supplied over eight hundred thousand barrels.

36646 Q. Well, pick any one of those years previous to 1937 and let me know what percent of your total was involved in the type of business that you described when you used that word "consequential."

A. I can't from memory give you a percentage.

Q. Would it be 10 per cent?

A. Of our total shipments? I will say there has been a time when it would be 10 percent, possibly more.

Q. And that business, that 10 percent, was handled in sales to contractors?

A. Yes, sir.

Q. And to no other class of customers?

A. Right.

Q. And do you issue or publish quotations to contractors?

A. Yes, sir.

Q. Do your competitors do likewise?

A. I can't say definitely. I think they do. I am not certain.

Q. Have you found with respect to any other class of your customers that this so-called secret price cutting occurred since 1932?

A. Not to any extent; no, sir.

Q. When you say "not to any extent," what do you mean?

A. Oh, we occasionally hear somebody saying some dealer got a cut price. Very rarely.

36647 Q. Exception to the rule, isn't it?

A. Yes, sir.

Q. Now, when you sold the States direct, and instead of selling contractors so that the contractors may use the cement in highway constructions for the State, did you quote the States prices off from your published prices, such as you do to the contractors today?

A. No, sir.

Q. Why didn't you?

A. Well, we quoted them the same price we quoted our customers at those points.

Q. Can you see any reason why you should give a contractor doing the work for the State a better price when the cement is to be used in the State highway work?

A. No, sir.

Q. Mr. Seeley asked you a question about your failure to quote f.o.b. mill prices to the State of Illinois. Do you recall that?

A. Yes, sir.

Q. If you had quoted f.o.b. mill prices as requested by the State of Illinois, the delivered cost to the State on

your quotations, that is, resulting from your quotations, would have been considerably different than the delivered cost of some of your competitors?

A. I don't know what our competitors quoted.

36648 Q. Well, if they had followed your lead and also quoted an f.o.b. mill price, as the State requested them to do, just as you could have done, all of you would have different prices, wouldn't you?

A. I don't know.

Q. That is, as to the delivered cost?

A. I don't know.

Mr. Seeley: Your Honor, I think we are wasting time on a speculative discussion, as to what would have happened if something else had been done.

Trial Examiner Norwood: No. He is testing him on this f.o.b. mill price.

The objection is overruled.

By Mr. MacIntyre:

Q. Can you see how you and your competitors would arrive at an identically delivered price if all of you had quoted f.o.b. the mill as requested by the State of Illinois?

A. Well, in the first place, Mr. MacIntyre, I do not believe we were ever requested to quote f.o.b. mill.

Q. Is that your testimony; that you never have?

A. I have no recollection of ever having been.

Q. That you were not requested during 1932 and 1933 to quote f.o.b. mill?

A. I do not believe we were. I do not remember.

Q. Well, my recollection of the record is other-

36649 wise, Mr. MacDonald.

A. Well—

Mr. Seeley: Well, what is the use of arguing?

The Witness: I don't just remember it.

By Mr. MacIntyre:

Q. What is the spread in your mill nets, that is, as between the high and the low, say, for the year 1936, Mr. MacDonald?

A. That is a little too far back for me to remember,—identify a specific year.

Q. Well, can you tell us as to any that you can recall?

A. I can tell you approximately what they were in 1939.

Q. Well, tell us the best you can as to any year that you can recall what your high and low mill net was.

A. Well, our high mill net in 1939, stripped of all cash discounts and package prices, would have been $1.70 a barrel.

Q. What?

A. $1.70.

Q. That is your high?

A. That is our high; yes, sir.

Q. And what is the low?

A. Well, the lowest I have in mind would have been the net that we obtained on a few cars of cement that we shipped to Milwaukee, and I think we had to make a freight absorption there. I do not recall what it was, Mr. MacIntyre, but I would say, oh, possibly 25 cents a bar-
36650 rel. But that is on a very, very small percentage of our total.

Now, the difference between our maximum mill net and our average realized price—I can tell you what that was.

Q. Well, how much is that?

A. Well, less than 6 cents a barrel.

Q. And what is the greatest distance to which you make shipments?

A. Five hundred and fifty miles, six hundred miles.

Q. Name one or two of those.

A. Minot, N. D.; Bismarck, N. D.

Q. And what would be your mill nets on those?

A. About $1—I do not recall exactly, but I will say $1.64, 65 cents, net, stripped of all cash discounts.

Q. On this invitation to the Government in 1938; that is, Commission's Exhibit 1339, you bid $1.80.

A. $1.70 with a cash discount.

Q. $1.80, though, less 10 cents discount.

A. Yes, sir.

Q. On page 36577 you have described the manner of settlement of disputes between you and your customers over loss of cement in transit.

Now, I will ask you in this connection if a car is shipped, seals are not broken, railroad disclaims any liability for any loss or damage to the cement, and it comes down to a settlement between you and your customer, and the
36651 shipping papers show that the cement was consigned to him, who stands the loss?

A. That is a matter that is determined. As a general practice, I would say we did.

Q. Do you consider—

A. We do not consider it impossible for us to make a mistake in counting the load of a car.

Q. Suppose, though, that the facts show that it was not your mistake; that is, your papers do not indicate it was your mistake, that you put 260 barrels in the car, but the customer claims he received 250—

Mr. Seeley: I have no objection—

Q. —the seal is not broken—

Mr. Seeley: Pardon me.

I have no objection if the proper foundation is laid. I do not think there is any testimony in the record by this witness that such an instance ever happened.

Mr. MacIntyre: I just cited the record to the witness.

Trial Examiner Norwood: I think he can tell us this situation.

Mr. MacIntyre: Will you please read the question thus far? I have not completed the question.

(Last question read.)

By Mr. MacIntyre:

36652 Q. Do you then ask the customer to stand for the 270 barrels, or the 250 that he claims he received—260 he claims he received?

A. Well, that becomes an argument, Mr. MacIntyre, between the man that has unloaded the car and our packer who loaded the car, and we do not claim to be infallible. If he has been a good customer and has not been accustomed to make complaints, and if we think the complaint was made in good faith, we allow it.

Q. Do you feel that you are bound to make the allowance to the customer, or do you do it as a practical matter to keep the customer satisfied?

Mr. Seeley: I object.

Trial Examiner Norwood: Objection sustained.

Mr. MacIntyre: Then, if Your Honor please, I
36653 move that this witness' testimony on this subject, beginning—

Trial Examiner Norwood: Just explain to me what that shows, what the relevancy is.

Mr. MacIntyre: Mr. Seeley attempted to show that the customer was not held accountable by this company for losses in transit. I am attempting to find out why, whether the company is doing it in an effort to keep the good will of the customer, or whether they are doing it because they

consider they are legally bound to do so. It seems to me that I am entitled to do that.

Trial Examiner Norwood: I think you can show that. Go ahead.

Mr. MacIntyre: Will you please read the question to the witness to which objection was sustained?

(The last question was read.)

Trial Examiner Norwood: The objection is overruled. Change my former ruling.

A. I could not say as to whether we would be legally bound to make the allowance, but as a practical matter we usually allow those kind of things.

By Mr. MacIntyre:

Q. You have never made the decision as to the first part of that, as to whether you are legally bound?

A. I could not say we are legally bound, whether we are legally bound there or not. I know the rail-
36654 roads are not legally bound.

Q. You do it merely for the purpose of keeping your customers satisfied?

A. Yes, sir; personally.

Q. How do you arrive at the capacity figures for your mill which you report to the Bureau of Mines?

A. The capacity figures that we report—I am not sure we report capacity figures to the Bureau of Mines.

Q. Well, it is our information that you do, Mr. Mac-Donald.

36655 Q. Well, is it your testimony that you do not so report, Mr. MacDonald?

A. I do not know whether we do or not. I do not think we do.

Q. How do you arrive at the capacity figures that you make up in your company?

A. On the basis of our experience.

Q. Well, what experience are you referring to?

A. Our experience in making cement.

Q. Well, what standards do you use in arriving at the figure that you compute; is it over a period of years or months or days, or just how do you arrive at it?

A. Well, in my mind, the capacity figure I have for our plant, in my own mind, I usually consider that on the fiscal year basis.

Q. Do you use any three highest months?

A. No, sir.

Q. Or any particular period in arriving at that?
A. No, sir.
Q. Never have?
36656 A. No, sir.
Q. You did furnish Mr. Mallory with a statement, and The Cement Institute, that statement showing your productions by months over a period of time, though, didn't you?
A. Yes, sir.
Q. From which a calculation could be made of your capacity in a formula of using three highest months over a period of time?
A. They could use them any way they saw fit.
Q. Can you name the other members of the advisory committee of The Cement Institute about which you testified on direct; that is, at the time that you were a member?
A. Back in 1930 there was Mr. Irvin.
Q. He was chairman, wasn't he?
A. Yes, sir. And I believe there was Mr. Jennings on that committee, I don't know.
Q. I call your attention to Commission's Exhibit 137-Q, and ask you if that refreshes your memory as to the membership of the committee at the time you served on it?
A. Well, this does not refresh my recollection as to the members of the committee; no, sir. It refreshes my recollection as to who was present, who was present at this particular meeting. I could give you some of these who were members of the advisory committee.
Q. All right. Name them.
36657 A. C. A. Irvin, W. J. Jennings, and I believe G. E. Pierson, and myself.
Q. Mr. J. B. John, of the Medusa Company, was a member, wasn't he?
A. I am not certain about that.
Q. I believe you stated on direct examination that the only function of this committee was that of arranging the management or personnel of The Cement Institute? Do you recall?
A. Of the Chicago division of The Cement Institute.
Q. Yes. Isn't it a fact that it concerned itself with contract checking activities of The Cement Institute?
A. Not the advisory committee, Mr. MacIntyre, that I recollect.

Q. I show you Commission's Exhibit, in that connection, Commission's Exhibit 2198, signed by B. H. Rader, acting for C. A. Irvin, chairman of the advisory committee. Does that recall to your mind some functions in that connection of the advisory committee of The Cement Institute? By the way, I will also inform you that the record shows that that particular letter came from the files of your company.

A. I do not think the advisory committee as a group had this in charge.

Q. Although this shows that Mr. Rader, acting for Mr. Irvin, as chairman of the advisory committee, took this, it is still your testimony that they did not act in that manner?

36658 A. I do not remember the advisory committee acting in a group on that basis.

Q. It is your testimony that you do not remember; is that correct?

A. My recollection is very dim on it.

Mr. Brick: The record shows what his testimony is.

Mr. MacIntyre: I want to clarify it.

Trial Examiner Norwood: Go ahead.

By Mr. MacIntyre:

Q. Well, you have said your recollection is very dim on it. Do you recall having received this exhibit that I refer to?

A. Yes, sir.

Q. You do recall having received it?

A. I recall a similar exhibit was received by our company; yes, sir.

36659 Q. Mr. MacDonald, have you found that during, say, 1930, price advances became effective in less time than they have in more recent years?

A. Well, there was a provision put into the Code that made it necessary for a company that was to advance its price to give, really, a 10-day notice. That was in 1933, some time, or 1934. Prior to that time there was no such provision in our sales policy.

Q. My question went to the period of 1930 as compared with 1936.

A. Oh, I believe I answered that.

Q. I do not believe so. What is your answer?

Trial Examiner Norwood: Answer again.

A. Prior to the provision of the Code, our policy was to advance our prices if we so desired, without any notice to the trade, other than just a notice of the advance, but no date as to when it was to be effective. The Code
36660 put in a provision which required a notice of practically ten days, during the Code.

Mr. MacIntyre: I think you misunderstood my question.

By Mr. MacIntyre:

Q. Mr. Seeley, on direct examination, asked you about the period of time over which it was necessary for a price advance to become fully effective on shipments, and you gave him a statement as to the period of time required. Now, my question is: Was not that period of time shorter, say, during 1930 than in 1936?

A. I am sorry, Mr. MacIntyre, I do not get the point of your question there.

Mr. Brick: Well, if I may make a suggestion, rather than describing the situation as the effective time required for a price advance, it might be referred to as the length of time which was required for the company to get the benefit of a price advance.

Mr. MacIntyre: Well, they use the word "effective," and so I attempted to use it, but we will adopt your suggestion and let the word "benefit" go into the question instead of the word "effective."

A. Well, I would say there was not any substantial difference. We have had to carry over contracts in those days, too.

By Mr. MacIntyre:

36661 Q. It was a shorter period of time, was it not, in 1930 than in 1936 and 1937?

A. To my recollection, there was no substantial difference.

Q. It was a shorter period, though, then; is not that correct?

A. My recollection is no, about the same.

By Mr. MacIntyre:

Q. You stated that the purpose of the work of the Public Relations Committee of The Cement Institute was to inform people that all cement was not manufactured by a single company. Do you recall your testimony on that point?

A. I do not think I said that was the—in just the language you have given it, but that was one of the purposes that I thought where the activities of that committee were useful. I believe that was the way I testified, not the way you put it.

36662 Q. What other purpose did you understand to be the work of the Public Relations Committee?

A. I do not recollect any other purpose. I paid so little attention to it that I have—I do not recollect very much about it.

Q. Calling your attention to Commission's Exhibit 2190-J, listing there the groups of people to be convinced of something by the Public Relations Committee of The Cement Institute, and in that is a list of State officials, including highway engineers. Can you tell me now what your understanding was to have been the thing that The Cement Institute hoped to convince those particular people about?

A. No, sir; I cannot.

Q. You think that they thoroughly understood that your cement was not manufactured by the same company as the other cement that—

A. Yes, sir.

Q. —they had been purchasing?

A. Yes, sir.

Q. That they knew that there were a number of companies manufacturing it?

A. Yes, sir.

Q. And you cannot tell me now what your understanding is that The Cement Institute hoped to convince those State officials about?

36663 A. No, sir.

Q. And what did you state was the purpose of the employment of Clark and Burns by The Cement Institute; that is, Professors Clark and Burns?

A. To make a study of the marketing practices that obtained in the industry.

Q. For what purpose?

A. To determine if they could recommend to the industry a better practice—in—better practices.

Q. In your reply to a questionnaire sent to you by Professors Clark and Burns, you stated that you had some criticism of the basing-point system by different people, and stated that one of the criticisms was that of uniform

pricing at destination as quoted by cement manufacturers. Do you recall that?

A. I do not recall that; no, sir.

Q. I call your attention to Commission's Exhibit 975-2-N. Does that refresh your recollection on that point?

A. Is this our answer?

Q. According to the record, it is.

A. I assume it is, but it says there we do not have very many of those.

Q. That is, not generally.

A. Yes, sir.

Q. But you stated when it did occur it is criticism of uniform practices when quoted by the manufacturer;

36664 is that correct?

A. Yes, sir.

Q. What other criticisms did you have of the basing point system?

A. I do not recall any.

Q. Your sales manager is who?

A. J. B. Cabanis.

Q. What part does Mr. Cabanis play in the formulation of your sales policy and marketing policy?

A. Well, I determine our policies, but I consult with him.

Q. He executed some for you?

A. Yes.

Q. He had authority to execute them?

A. Under my direction only.

Q. How long has he had that authority?

A. Since he became sales manager.

Q. When was that?

A. August, 1929.

Q. Does he have an assistant in his office by the name of Pray?

A. Yes, sir.

Q. What is the full name of Mr. Pray?

A. G. B. Pray.

Q. He works under the direction and under the authority of Mr. Cabanis?

36665 A. He works under his direction.

Q. Do you have a salesman working under the direction of Mr. Pray and Mr. Cabanis by the name of Byfield?

A. Yes, sir.

Q. What is his territory?
A. North Dakota—part of North Dakota.
Q. What is his full name?
A. H. W. Byfield.
Q. How long has he been working in that territory?
A. Oh, I would say 12 or 13 years.
Q. Has he the authority to make reports and does make reports to Mr. Pray and to Mr. Cabanis in the regular course of his business, does he?
A. I don't know how you use the word "authority." He has instructions to make reports.
Q. Well, he has the authority, if you so instruct, him, does he not—and expresses himself on competitive conditions in doing so?
A. He has instructions to obtain information regarding competitive conditions.
Q. I believe you testified that you use your freight rate books for the purpose of figuring prices. Do you recall that testimony?
A. Yes, sir.
Q. And just how are they so used?
36666 A. They are used by our salesmen and our office force—clerks.
Q. How?
A. To determine the freight rate from our point to the point at which they wish to obtain the price.
Q. How do they use them in that connection in quoting prices?
A. They take our mill base figure, the mill price, and add the freight rate to it, in cents per barrel.
Q. They contain, then, one of the factors in making up your price; is that correct?
A. They contained the freight factor; yes.
Q. I say, your freight rate book contains one of the factors.
A. It does not contain the fixing factor. It is just a small factor that is obtained from the tariff. It does not fix the measure of the rate.
Q. In such cases where you use your freight rate books for the purpose of price computation, are you interested in whether or not your competitors, in using freight rate books in a similar manner, use the same rate as you do?
A. No, sir.

Q. You are not interested, then, in whether or not they quote the same price as you do?

A. We are; yes, sir; that is, only to the extent
36667 where we are meeting competition and our price is competitive. Any other competitors can quote any price they want.

Q. You are not interested in whether your competitors use the same freight rate as you do, even though they use the same basing-point price as a starting point?

A. Mr. MacIntyre, we are not interested—the freight rate of our competitors is of no interest to us. The only interest to us in the price that they use at the destination where we are soliciting business. Now, how they arrive at it, whether they use our rate book or freight rate books, whatever such a structure is, it is of no interest to us, how they arrive at it.

Q. Well, if they arrive at the price, though, in quoting at destination, in the same manner as you do, are you not then interested in their using the same rate and the same base price as you do?

A. No.

Q. You do not care if they get a different price than you; is that correct?

A. We do not care if their price differs from ours, as long as it is higher than ours.

Q. You are interested, then, as to whether or not it differs from yours, if it is lower; is that correct?

A. If it is lower than ours, we are going to find out about it, and meet it; that is all, regardless of how
36668 they arrived at it.

Q. But if they arrive at their base in the same manner as you do, you are interested in it, if they are lower than you; is that correct?

A. Regardless of how they arrive at it, if theirs is lower than ours, we are interested in it.

Q. In the light of that statement, how can you reconcile it with your statement appearing between lines 18 and 20, page 36570?

A. Well, I think I have explained that. I do not see that that is contrary to my testimony right now.

Q. You think they are consistent?

A. Yes, sir.

Q. You quote the price to the Federal Government in 1938 on the so-called Good Friday invitation now in evi-

dence, Commission's Exhibit 1339, when you quoted them an f.o.b. mill price on a quantity of half a million barrels were you particularly interested where that cement was to be used?

A. No, sir. I said right in my letter the Government could take it any place they pleased, no restrictions on it whatever.

Q. Why didn't you then bid on invitation which is referred to in Commission's Exhibit 1063, calling for an f.o.b. mill bid on cement the Government expected to use in Rolling Fork, Miss.?

36669 A. We had no idea what the price situation was in Rolling Fork, and we had no idea that any mill price we could have made at Mason City would have been competitive in Rolling Fork. Had we thought our $1.80 mill price would have been competitive at Rolling Fork we would have been very glad to bid and hoped to have gotten the business.

Q. Why couldn't you have done the same thing that you did on the Good Friday bid, bid your price at the mill and let the Government take it if they could figure it out as lower destination cost, or not take it as they found someone else lower.

A. We could have, but we thought it would be just a waste of time. We have never shipped any cement in that territory.

Q. You did not take the time to even think about the land-grant rates that were involved, or the high prices the Government would have to pay dealers at that particular destination if they should buy through dealers?

A. We had no idea how the Government was going to buy down there.

Q. Now, coming back to the freight rate books that your company has prepared, I believe you state that they are prepared from the tariffs?

A. Yes, sir.

Q. And you consider that they all reflect the rates as appear in the tariff.

36670 A. Yes, sir.

Q. Why doesn't your Iowa freight rate book carry rates from Des Moines, Iowa, to destinations in that State?

A. We have at times past carried rates from Des Moines, Iowa, but in later years we have had so many

new basing points come in competition with them that we just simply haven't had room to carry all those headings across there. Maybe we do carry them now. I have not looked at one of those books for a long time.

Q. Des Moines is located in the State in which your mill is located?

A. Yes, sir.

Q. You do carry Steelton in the freight rate book, and it is located in another State, and much further away.

A. That is right.

Q. And you say the fact that Des Moines is not a basing point has anything to do with that?

A. That would be the reason that we dropped it in order to save space because we do not use it.

Trial Examiner Norwood: Read that answer.

(Answer read.)

By Mr. MacIntyre:

Q. Well, in the saving of space you decided to drop that instead of dropping some of the other basing points that were far, far removed from your territory; is that right?

36671 A. Well, I am not certain, Mr. MacIntyre, that we do not carry Des Moines right now, but that we would, if we only had room for a certain number of headline points we would carry those that we had every-day use for, and not the other ones.

Q. Your Iowa book which you put in evidence here Friday shows that Des Moines is not carried as a headline point. You say you are not sure. I call your attention to that.

A. Well, I remember we used to carry Des Moines in our book, and I do not recall now whether we do now or not.

Q. Now, calling your attention to Commission's Exhibit 3022-Y, and page 2 of your Minnesota book, which is Respondents' Exhibit 2718-C, since you say that your rates in your Minnesota rate book came from the tariff, and is correct, how can you account for all of the differences in the rates in there from the rates in The Cement Institute book which I have referred to as Commission's Exhibit 3022-Y?

Mr. Seeley: May we know, Your Honor, what the differences are?

A. These are entirely different dates.

36672 A. These are all different dates.

By Mr. MacIntyre:

Q. Your book is dated 1935 and The Cement Institute book or correction sheet I refer to is a rate as of October 1, 1936.

A. That is right.

Q. Now, I also show you Respondent's Exhibit 2719-A and B, which are your correction sheets.

A. Yes, sir.

Q. Bringing your book down to 1935.

A. Yes, sir.

Q. Can you throughout all of those find out how the differences, or account for the differences that appear between your book and The Cement Institute book?

A. I will take the first notation; Dickson, Ill., to Metropolis, the Institute book carried a rate of 22½ cents, we carry a rate of 23½ cents.

Q. Can you account for the difference?

A. I think that this correction sheet of the Institute was the correction sheet that was issued after one of the emergency raes was canceled, which would have reduced the rate back to the previous rate.

Trial Examiner Norwood: That was an emergency rate of one cent?

36673 The Witness: Yes, sir.

By Mr. MacIntyre:

Q. Your correction sheets do not show that advance and then the reduction.

A. Our correction sheets are not of that date; Mr. MacIntyre.

Q. I understood you to testify further that your correction sheets—that is, Respondents' Exhibit 2719-A and B—brought your book down to date from 1935, showing all changes that had taken place.

A. No, sir; I do not believe I testified to that.

Q. Well, what is your testimony concerning those correction sheets that you put into your evidence here last Friday?

A. I believe we brought our books down to date as of the date of the correction sheet, not down to 1938. We have issued entirely new books since then.

Q. One of your correction sheets is in 1938, and you told me on Friday that they carried all of the changes from the date of that book until the last date shown on the correction sheet, which is 1938.

A. Well, this correction—

Q. Are there some correction sheets to that book which you did not furnish here?

A. I believe there is. I don't know. I do not say we did not furnish them, but I believe there is a sheet missing here. I would have to check this up pretty carefully.

36674 Mr. Seeley: I may say, Your Honor, that these sheets that Mr. MacIntyre is referring to would bring us all down to a date subsequent to the date of the complaint.

Mr. MacIntyre: These differences in the rates are as of October 1, 1936, that I am trying to have the witness straighten me out on, if he can.

Mr. Seeley: Your Honor, could we have Mr. MacIntyre bring in the rate book, rather than the correction sheet? We are shooting in the dark here. We have not the whole book here. I think it is unfair to ask a man to explain something with only a part of it in front of him.

Mr. MacIntyre: We have the statement of The Cement Institute as of October 1, 1936, as to what the rate is as of that date, and we have everything that the witness has furnished us from his company, which he claimed would show the rate as of that date. I do not think there is any necessity to bring in anything.

Trial Examiner Norwood: Is there anything else necessary for you to answer that question, Mr. MacDonald?

The Witness: I am trying to check this. I never saw this Institute rate sheet before.

Trial Examiner Norwood: Look it over.

The Witness: This is a brand new one on me. I never saw it.

36675 By Mr. MacIntyre:

Q. Is it your testimony that you cannot account for the differences appearing in the freight rate books with what you have in that book?

36676 A. No; that is not my testimony.

By Mr. MacIntyre:

Q. Well, can you account for them?

A. It is a difference in the emergency freight charge that expired on August 22, 1936.

Q. Commission's Exhibit 3022-Y, statement by The Cement Institute, is to the effect that the rates shown thereon were effective October 1, 1936. I am asking if you can

tell the differences appearing thereon from the rates shown in your rate book.

A. That is the only way I can account for them. That is the difference in those emergency tariffs.

Q. You cannot account for them in any other way?

A. No, sir. The difference in all cases seems to
36677 be just one cent.

Q. With the apparent differences there, one rate would have to be an erroneous rate—either yours or The Cement Institute; is that correct?

A. They were not the same rate.

Trial Examiner Norwood: Now, what is it?

The Witness: But all these rates are just one cent different; so it is that emergency rate; when it was canceled, that made the difference.

Trial Examiner Norwood: Go ahead.

By Mr. MacIntyre:

Q. Mr. MacDonald, why do you compile your own freight rate book, as long as The Cement Institute has them available?

A. We always compiled our own freight rate books, and when the Institute made their books available we did not avail ourselves of that service because we were not sure that the Institute would continue to issue their books, and we did not want to be left without that service,
36678 should they decide not to continue it. So we came to the conclusion to publish our own books.

Q. That is true, even though they have been carried along for 10 years.

A. Yes, sir.

Q. You have stated that you do secure one freight rate book from The Cement Institute. Can you tell me how that is used in your organization; for what purpose?

A. I think we get one Institute book for several States, Mr. MacIntyre.

Q. How do you use that book in your organization?

A. We practically do not use it at all.

Q. Do you pay for it?

A. Well, I think that is furnished along with the rest of the service, in consideration of the dues that we pay; so a small percentage of it might be allocated to that book, and I presume you could say that we pay for that book.

Q. You pay for it, and you get it, but you do not use it; is that correct?

A. We put it to very little use.

Q. Well, what little use do you put it to?

36679 A. Well, I am not sure that our traffic man uses it at all; but I do not want to testify that he does not.

Q. You have no way of knowing how many differences in rates appear between your rate books and The Cement Institute rate books, do you?

A. None whatever; no, sir.

Q. And you cannot account for those that do appear?

A. No, sir.

Q. Mr. MacDonald, can you tell us how much it costs you, or your company, to take the rates out of the supplements and make corrections from those supplements to the books that you use?

A. During what period.

Q. Well, take the year 1935.

A. I do not recall how many changes were made in the rates at that time.

Q. Well, do you have in mind any one since then?

A. The expense, Mr. MacIntyre, of maintaining our rate service, if that is what you are driving at, is not very great.

Q. Well, can you approximate it for us?

A. The total expense, part of the time of one man and the stenographer. Now, what part that is varies from year to year, but it is not anything that bothers us.

Q. In figuring the freight from your own mill, how much time does he use, just figuring the freight

36680 from your mill to the destinations you serve?

A. I could not tell you.

Q. Would that be a small part of his time?

A. I could not tell you.

Q. Have you read the testimony of other witnesses who preceded you in this case, Mr. MacDonald?

A. Some of them.

Q. And what part?

A. Sir?

Q. What part of it have you read? How much?

Mr. Seeley: Well, I object to that, Your Honor.

A. Oh, the total—

Trial Examiner Norwood: The objection is overruled. Answer the question.

A. The total testimony I may have read, anywhere from 80 to 85 percent; I could not say. A substantial portion of it.

36681 *Redirect Examination by Mr. Seeley.*

Q. Mr. MacDonald, since you have been with your present company, the Northwestern States Portland Cement Company, have you ever gotten any business from the State of Illinois? Have you ever sold the State of Illinois any cement?

A. Not to my knowledge.

Q. Now, with respect to these secret prices which Mr. MacInfyre asked you about, what have you found as to the contractors that you do business with, when you learn of a competitor's special price to a contractor, have

36682 those contractors or have they not given you an opportunity to meet those prices?

A. Our friendly contractors give us an opportunity.

Q. I think you said you do meet them when you want the business.

A. We have no fixed policy on it. We have met them and we have not.

Q. Now, as to the State of Iowa, about which you were questioned by Mr. MacIntyre. I think you said that since the requirements of the State had been bid by the contractors that you had on occasion found secret prices and had given prices which were lower than your current market prices; is that correct?

A. Yes, sir.

Q. Well, what is the fact, did the State of Iowa, or any State, ever request any secret prices from you?

A. As far as I understand it, they have—according to law, they have got to take sealed bids which are certainly not secret prices.

Q. So that your answer is no, do I understand it,—what is your answer?

A. Why, I would say that they have never requested any secret prices.

By Mr. Seeley:

Q. Now, as between the State bidding on its own

36683 requirements, and contractors bidding on State work, State requirements, why have you in cases of contractors given these special prices on occasions?

A. Did you say why have we?

Q. Yes.

A. To meet competition.

Q. Well, when you were bidding to the State did you ever find it necessary in order to meet competition to give such prices?

A. No, sir.

Q. Now, Mr. MacDonald, Mr. MacIntyre asked you about the freight rate book of the—I think the State of Iowa—and he asked you about one of the headline points, I think it was Des Moines, showing you Respondents' Exhibit, for identification, 2720-A to blank; will you look at these cards—let's see how many there are.

Q. Will you look at those cards, Mr. MacDonald, and tell us whether there are any rates on there for those destinations from Des Moines?

A. They all carry rates from Des Moines.

36684 Q. And I ask you the same question with respect to Respondents' Exhibit 2717-A to F.

A. They all carry rates from Des Moines.

Q. Can you tell us, in one answer, Mr. MacDonald, whether any of your rate cards, or tell me, are these cards typical of the rate cards which your company carries with respect to the headline points?

A. They are.

36693 By Mr. Seeley:

Q. Now, Mr. MacDonald, how many tariffs are there in the Western Traffic Line territory, which, I understand, is the territory in which you do business? How many tariffs do you refer to in making up these freight rate compilations that you spoke about?

A. I would say that 90 percent of the rates that we use on cement from Mason City, or substantially over 90 percent, are in one tariff. Then, the other small percentage is in another tariff, and then there is a third tariff which

gives the rates from Steelton, Minn., to certain 36694 points in Northern Minnesota and North Dakota.

Q. What period are you speaking of now?

A. Oh, away back to 1920 or 1921—somewhere back in there.

Q. Well, with respect to the period since 1921, has it been more or less necessary for you to have access to more than one tariff than it was at that time, in 1921?

A. Well, I was taking it back to the time when these tariffs were first issued, and they have been the same ever since.

36695 *Recross Examination by Mr. MacIntyre.*

Q. On these special prices to contractors about which you have been testifying, Mr. MacDonald, can you cite any instances between January, 1933, and July, 1937, where your competitors gave any of the contractors that you had in mind this morning a special price that was lower than the published prices to those companies,—to the dealer trade?

A. I can give you plenty of hearsay evidence. I cannot produce any written evidence.

36696 Q. You have only hearsay on it; is that correct?

A. Yes, sir; only what the contractors have told me. I can give you plenty of those.

Mr. MacIntyre: All right.

If Your Honor please, I move to strike all this witness' testimony concerning special and secret prices he gave here this morning and this afternoon. He shows it is all based on hearsay, not on any factual knowledge that the witness had.

Trial Examiner Norwood: Well, that information came to him in the due course of business, wasn't it?

Let him give you the hearsay that you want there.

Mr. MacIntyre: He cannot give us anything except hearsay, and we do not want that.

Mr. Seeley: Your Honor, merely because the witness calls it hearsay does not make it hearsay.

Trial Examiner Norwood: That is why I used the term in my remark there.

Mr. MacIntyre: Your Honor please, a further objection to that type of information is just this: If it was ever passed on through the course of business to this man it was given a special motive in an effort to try to get him to do something away from his published prices; that is, in the way of quoting them, the published prices, therefore, it is the most unreliable type of hearsay.

36697 Trial Examiner Norwood: Now, Mr. MacIntyre, will you just bring out the sources of his information there as much as you wish to? Have you gone into

that as thoroughly as you want to? I shall deny the motion for the time being.

Mr. MacIntyre: Well, I shall have to ask now something else.

Trial Examiner Norwood: Go ahead.

Mr. MacIntyre: But I think it is all avoidable.

Trial Examiner Norwood: I will take your motion under advisement, but I cannot recall it with sufficient clarity to enable me to just strike it offhand.

By Mr. MacIntyre:

Q. Mr. MacDonald, can you cite any instance that occurred between the dates of January 1, 1933, and July 2, 1937, where your competitors made any special prices below their published prices to contractors?

A. Yes, sir.

Q. Based on hearsay that you received?

A. Well, based on the personal conversation I have had with the contractors.

Q. What instance of such conversation can you refer us to?

A. I cannot refer you to the exact date, but I can give you the name of the contractors.

Q. What year?

36698 A. Well, this would apply to various years, various years during the period you have mentioned.

Q. During the period I mentioned?

A. Yes, sir.

Q. What years during that period?

A. Well, pretty nearly all of them, I would say.

Q. What contractors?

A. The Capital Construction Company, Des Moines.

Q. And who did he say gave him a special price?

A. That is only one of them.

Mr. Brick: Your Honor please, may the witness complete the answer? He was asked what contractors. He was cut off after naming the first one.

Trial Examiner Norwood: Yes. Complete your answer.

A. The Adolph Carlson Construction Company of Marshalltown; J. S. McLaughlin Sons of Mankato; Metz Construction Company of Clear Lake.

By Mr. MacIntyre:

Q. Well, from whom did they say that they received a special price?

Mr. Brick: Let him continue with his recitation.
Trial Examiner Norwood: Exactly.
Did you complete your answer?
The Witness: That is the personal ones I have in mind right now.

36699 By Mr. MacIntyre:

Q. Well, from whom did they say they had received special prices?

A. From the Marquette, Ash Grove, Hawk Eye.

Q. Did you confirm that?

A. I could not confirm it in writing.

Q. In what manner did you confirm it, if at all?

A. I made an effort to check the information by checking other contractors who were buying cement at the same time.

Q. The only conversation you had then was by other hearsay statements from other contractors?

A. It was contractors' statements to me.

Q. That is what they told you, did they; is that correct?

A. That is right.

Q. And you did not attempt to confirm it in any other manner?

A. I would not say I did not attempt to. I asked
36700 them to show me quotations, but they did not do it.

Q. They did not show you the quotations?

A. No, sir.

Mr MacIntyre: I now move to strike the witness' testimony on that subject, and, if Your Honor please, I also at this time move to strike from the record stipulated testimony of this witness appearing at pages 36474 through and including page 36488, as cumulative, unnecessarily so, and also move to strike the testimony appearing, beginning at line 22, page 36475, to and including line 24, page 36476, as going to irrelevant and immaterial matter in addition to being cumulative, and the same objection and motion to strike applies to the testimony appearing on page 36479, beginning at line 10, continuing to line 22 on that page.

Trial Examiner Norwood: We will have a five minutes' recess.

(There was a short recess taken.)

Trial Examiner Norwood: We will proceed.

The first motion, to strike certain testimony of this wit-

ness, I will deny, and as to striking parts of the stipulation, the motion is allowed so far as striking from line 4; page 36476; to and including line 24 on the same page.

36701 By Mr. MacIntyre:

Q. These Respondents' Exhibits 2719-A and B, which have just been received in evidence through the redirect examination, are they the only correction sheets that have been issued by you for your freight rate books, which are in evidence as Respondents' Exhibits 2718-A to D, inclusive?

A. I believe they are.

Q. They are the only ones?

A. I think so.

Q. They bring your books down to date; is that correct?

A. Down to the date that they were canceled—not down to the present date.

Q. Well, down to the date that is shown on the correction sheets?

A. Yes.

Q. March 28, 1930?

A. Yes, sir.

Q. Is that correct?

A. I think so; yes, sir.

Q. I would like to also ask you with reference to these correction sheets of yours, Respondents' Exhibit 2719-A and B; does your traffic man send copies of those to The Cement Institute?

36702 A. No, sir.

Q. Or to other members of the industry?

A. No, sir.

Q. How do you know that?

A. I know it is not our practice to do it. He would not dare do anything like that without my authority. He works directly under me, and I know he would not do it.

Q. You are positive that he has never done so?

A. Yes.

Q. And that you never informed your competitor as to the rates you are using?

A. Not from our office; no, sir. If he finds it out, he has to find it out through the field.

Redirect Examination by Mr. Seeley.

Q. Mr. MacDonald, with reference to the information which you told Mr. MacIntyre you received from contractors regarding special prices which they received from competitors, what is the fact: Have you or have you not sold any cement at those special prices on the basis of the information that you received?

A. We have.

36708 JAMES F. McCRACKEN, called as a witness for the Respondents, being first duly sworn, testified as follows:

Direct Examination by Mr. Withrow.

I am James F. McCracken and live in Louisville, Kentucky. The name of the company with which I am associated is the American Builders Supply Company. I am
36709 manager, and have held that position since the company was formed in 1925. I have always had the capacity of manager. American Builders is a dealer in building material. We handle almost everything, except lumber. We do not handle any lumber. We operate a ready-mixed concrete plant, and steel fabricating yard. We deal in cement, through the warehouse, brick, mortars, brick roofing, metal lathe, and building specialties—a full line of builders' supplies. I did not have any experience in dealer or contractor business prior to my association with that company. I have never been connected with any cement manufacturing company. The main office of my company is at 405 Gordon Street, in the City of Louisville. We have no branch offices.

Q. Is your company affiliated in any way with any cement manufacturing company?

A. No, sir.

Q. Are any of the officers or directors of your
36710 company officers and directors of any cement manufacturing company?

A. No, sir.

Q. Does your company have any warehouses or silos for storing cement?

A. We have warehouses for handling our sack cement,

and we have bulk storage bins at our concrete proportioning plant or mixing plant, for handling it.

Q. Are these located in Louisville?

A. Both in Louisville.

Q. How long has this company been handling Portland cement?

A. It has been handling cement since 1925, and ready mix concrete since 1931.

Q. If you can, tell us about what is the average volume of your cement purchases per year?

A. We started in '25, new, and we handled very little. We now handle upwards of a hundred thousand barrels of cement a year.

Q. What do you do with the cement which you purchase?

A. We sell it to contractors.

Q. Anyone else?

A. We sometimes sell to the municipality, the city, or to Government agencies, or anybody that buys cement, we try to sell in our territory.

Q. Do you consider yourselves to be a cement dealer?

A. We do.

36711 Q. What cement manufacturing companies solicit your business?

A. Well, there are a great many cement manufacturing companies that solicit our business spasmodically. Louisville is kind of surrounded by cement mills.

Q. Will you list them?

A. Well, starting out and trying to follow them geographically, the Universal, Marquette, Red Wing, Lehigh, Lone Star, the mills across the State of Tennessee; that is, Penn-Dixie, Hermitage, Volunteer, and Signal Mountain, and mills up in Ohio, Alpha and Miami and Wabash, and the two local mills, Kosmos Por and Cement and Louisville Cement Company.

Q. Now, you mentioned Red Wing; is that the name of the company, or brand?

A. That is a brand; that is Missouri Portland.

Q. And Miami; is that the Southwestern?

A. Yes; I believe that is right.

Q. Now, would you tell us from what companies you normally purchase cement?

A. Well, we purchase a good deal of it from the two local companies, Kosmos and Louisville Cement Company,

and we purchase regularly from Alpha, Universal, Lone Star, and Medusa.

Q. Now, would you tell us briefly why you purchase cement from those five or six companies and do not purchase from the other companies who solicit your business?

36712 A. We purchase from them for different reasons, chiefly because those companies work with us and help us make sales, like take Medusa, we buy white cement from them. Take Universal, we buy Aluminite cement from them, but chiefly because they in some way or other help us in getting business or on a friendship basis.

By Mr. Withrow:

Q. Does the question of service which a cement company renders ever enter into it?

A. Yes. They help us in making sales and other things.

Q. Do any of the companies ever furnish you with technical data?

A. We have gotten a good deal from them, particularly since we went into the ready-mix business, starting that business particularly.

Q. Is that of any value to you?

A. It has been a great deal

Q. Does it result in any saving to you?

A. Well, yes, it does, in that we produce a better
36713 product, in our ready-mix business, more accurate.

Q. Mr. McCracken, do you ever ask for special price concessions below the quoted prices which are sent to you?

A. We haven't.

Q. And would you tell us your reasons for not asking any special price concession?

A. In the dealer's position he has to have a firm price, that is, we have to figure a job, a contract for the contractor before he puts in his bid, and he has to hold his bid open for maybe some considerable time, and then we have to furnish that contract over a period of time, and if the prices are varying up and down, why, we do not know where we stand or what to do with them.

Q. Now, does your company purchase cement at delivered prices?

A. Yes.

Q. On what basis do you request price quotations from cement companies?

A. Price on our track.

Q. That is, delivered to you?

A. Delivered, yes.

Q. Have you ever made requests to purchase cement f.o.b. some cement company's mill?

A. No, we haven't.

Q. Would you tell us your reasons for requesting delivered prices?

36714 A. We are only interested in our cost. We do not have to bother with checking freight rates, or whether the freight rate is right or wrong. That is what it costs us. We know what our cost is then.

Q. I believe you testified that you bought products other than cement?

A. Yes.

Q. That is correct?

A. Yes.

36719 Washington, D. C.,
April 17, 1940.

36721 JAMES F. McCRACKEN thereupon resumed the stand and testified further as follows:

Examination on Voir Dire By Mr. Wooden.

Q. Mr. McCracken, referring to Respondents' Exhibit 2735-D, for identification, is that commodity covered by that invoice sometimes known as fire brick?

A. Yes, sir.

Q. Do you know anything about the whys and the wherefores of prices being made on fire brick in the form that they are made here?

A. We try to buy everything delivered Louisville.

By Mr. Wooden:

36722 Q. Do you know anything as to why the producers and shippers of fire brick make their prices in this form? Is it because you ask them to? You would not say that, would you?

A. Perhaps a great many other people ask the same thing and for that reason they do.

Q. Yes, perhaps, but what do you know about it? Do you know what they do, as to why they want to make their prices this way?

A. I know that we requested prices that way.

Q. And you do not know whether they serve any purpose of the manufacturers other than to accommodate you?

A. That is all; I don't know.

Q. Now, referring to Respondents' Exhibit 2735-E, for identification, that covers steel furring channel, doesn't it?

A. Steel channels, yes.

Q. Steel channels. Do you know whether or not that product is sold on a basing-point system, or not?

Mr. Withrow: Same objection to that question, Your Honor.

Trial Examiner Norwood: The objection is overruled.

A. I don't believe this particular commodity is.

By Mr. Wooden:

Q. What does that mean to you about the Chicago value down there from a St. Louis producer and shipper, you get your discount off the Chicago value, don't you?

36723 A. Yes, that is true.

Q. In other words, doesn't that indicate to you it is sold on a Chicago base although shipped from St. Louis, or near St. Louis?

A. The freight is the St. Louis freight.

Q. Yes, but the discount is figured off the Chicago, isn't it?

A. Yes.

Q. Now, referring to Respondents' Exhibits 2735-F and 2735-G, are those products covered there, are they what is known as vitrified pipe or terra cotta pipe, or what?

A. Flue lining and terra cotta pipe, or vitrified pipe.

Q. In other words, are terra cotta pipe and vitrified pipe the same thing?

A. Yes.

Q. Do you know anything about the whys and wherefores of why these manufacturers of sewer pipe or vitrified pipe or terra cotta pipe price their goods delivered to you at Louisville?

Mr. Withrow: The same objection, Your Honor.

Trial Examiner Norwood: The objection is overruled.

A. No, I do not, except, as I say, we always try to get prices in Louisville.

By Mr. Wooden:

Q. As a matter of fact, weren't these the various ship-

pers of these other commodities other than cement
36724 pricing that way before you went into business?

A. Sewer pipe has not; all manufacturers of sewer pipe, I do not believe they do price us that way. We bought sewer pipe at the plant.

Q. And even now, or even lately?

A. Not recently we haven't, we haven't for a good many years.

Q. About how many?

A. The last four or five years I don't think we bought any at the plant.

Q. Prior to that time you did?

A. We bought from some manufacturers and not from others.

Q. Now, referring to Respondents' Exhibits 2735-H, for identification, do your know anything about the whys and wherefores of the gypsum manufacturers pricing their goods delivered to you at Louisville rather than f.o.b. shipping point?

A. The same thing would apply to that as the rest of them.

Q. And this Exhibit 2735-I, for identification, that covers brick, doesn't it?

A. Yes.

Q. And what kind of brick?

A. This is face brick.

Q. Face brick; and do you know anything about the whys and wherefores of manufacturers of brick pricing delivered?

A. No. On face brick I think almost certainly that that is purely and simply because we requested it that
36725 way. There could be no question thereof—

Q. Have you always bought it that way?

A. We buy all of our brick that way.

Q. Have you always bought your face brick that way?

A. All that I know of.

Q. Never bought any face brick f.o.b. mill or f.o.b. yard, rather, producing yard?

A. We buy local brick at the yard because in that case we truck some of it, but other brick shipped into us we buy at our—f.o.b. our yard.

Mr. Wooden: Well, Your Honor, I object to these exhibits, 2735-H—I have a further question.

Trial Examiner Norwood: Go ahead.

By Mr. Wooden:

Q. Did you select these papers from your files?

A. Yes.

Q. How did you come to make the selection?

A. I was asked whether I bought any material except cement on delivered prices, and I said that we bought everything on a delivered price that we could buy on a delivered price. I was asked if I had any invoices to substantiate that statement, and I picked out some of them that showed that.

Q. Who asked you to make these selections of invoices?

36726 A. I was asked by Mr. Withrow.

Mr. Wooden: Well, Your Honor, I object to these exhibits, Respondents' Exhibits 2735-D, E, F, G, H, and I, as being incompetent, irrelevant, and immaterial for the reason that they relate to commodities that are not involved in this case. They relate to conditions, conditions competitive and otherwise, that are not involved in this case. They can throw nothing whatever that is relevant and material into the issue in this case. We are not going out, I hope, to try out the basing-point system and the delivered-price system in other industries in con-

36727 nection with this.

I object.

Mr. Withrow: How about the rest of the offer?

Mr. Wooden: I object to the others which comprise Respondents' Exhibits 2731, 2732, 2733, 2735-A, B, and C, as being incompetent, irrelevant, and immaterial, particularly irrelevant and immaterial because they add nothing to the witness' testimony about purchasing cement on a delivered-price basis, and if there is one thing that this record shows super-abundantly it is that cement is sold at delivered prices, and that is all these things show.

Trial Examiner Norwood: Doesn't that show how the freight is charged out?

Mr. Wooden: Yes, it did that, but that has been abundantly shown, too.

Trial Examiner Norwood: Those are all cement invoices, are they?

Mr. Wooden: Well, one of them is a bill of lading, I believe; other than that, I think the rest of them are invoices, one invoice is confined entirely to a special brand

of cement, import, while this case has to do with standard Portland cement.

Mr. Withrow: From time to time Mr. Wooden has been asked to state his position as to whether or not high early strength cements were in this case, and he has blown
36728 hot and cold on that.

I now take it that that is an admission by Counsel for the Commission that high early strength is not in the case, and I am very glad to hear that because we wondered what his position was since he has taken various sides of that question.

The complaint, of course, has nothing about what cement they are talking about. As a matter of fact, it only mentions Portland cement once, and the whole answer referred to cement which covers a great number of products.

Mr. Wooden: I certainly have been consistent, at any rate, in withholding to prove the methods of fixing price or naming prices in the special brands of cement.

Trial Examiner Norwood: I do not see that those special brands that sell at special prices are involved in this case.

Mr. Brick: I think that is right.

Mr. Withrow: I think that is right, but there are some exhibits which deal only with special cements, and I am glad to know that we no longer have to meet those exhibits, and I accept the concession by Counsel for the Commission.

Trial Examiner Norwood: All the material in the exhibits does not make issues. Now, I shall overrule the objection and receive the cement invoices in this case,
36729 Respondents' Exhibits 2731, 2732, 2733, 2735-A to C.

(The documents heretofore marked for identification "Respondents' Exhibits 2731, 2732, 2733, 2735-A 2735-B, and 2735-C," were offered and received in evidence.)

Trial Examiner Norwood: I shall sustain as to all of the others numbered between 2728 and 2735; that is, Respondents' exhibits numbered between 2728 and 2735 excepting 2735-A to C.

We haven't time to try all these other industries and it would not be fair to let this information in about them unless you let in all the information. We haven't time to do that.

Mr. Brick: That was not the purpose of the offer, Your Honor please. The purpose of the offer was to demon-

strate the extent to which the witness' desire to have delivered prices at his yard has been fulfilled, and this is proof of that fact.

We are only interested in the testimony of this witness and the extent of his statement concerning the purpose of having delivered prices for the orderly conduct of his own business, and I think we can demonstrate that that desire on his part is respected by the people with whom he does business, and it seems quite material to me to determine if we have a fair portrayal of the entire
36730 situation, to know what the situation is with respect to the purchaser.

Trial Examiner Norwood: Now, even that is of doubtful relevancy.

Mr. Withrow: Your Honor, it most certainly is not, if Your Honor—

Trial Examiner Norwood: Well, I have ruled, gentlemen. Let us not discuss it any further. We are not trying these other industries.

Now, go ahead.

Mr. Wooden: I would like to make this offer of concession in that respect, if it will save any time.

Trial Examiner Norwood: Go ahead.

Mr. Wooden: That we concede that other products are sold on a delivered-price basis sometimes resulting from the use of a common basing-point system, sometimes from freight-equalization system, sometimes from zone systems and various other methods of purchasing them result.

Mr. Brick: And sometimes on the request of the Federal Government.

Mr. Wooden: No, not that system.

Trial Examiner Norwood: Proceed.

Direct Examination by Mr. Withrow (Continued).

Q. Mr. McCracken, will you tell us to what extent
36731 the persons or companies from whom you purchase your various supplies give you delivered prices upon your request for prices f.o.b. your plant?

Mr. Wooden: I object unless it is confined to the cement, Your Honor.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: The objection is sustained. You may tell us about that with respect to cement.

By Mr. Withrow:

Q. Mr. McCracken, do you buy any products f.o.b. the manufacturer's mill without regard to what it would cost you laid down at your warehouse?

A. Practically everything we buy is bought at our plant, 90-odd percent of it.

Q. Now, Mr. McCracken, would you tell us whether or not freight is a large factor in the cost laid down at your warehouse on most of the products you buy?

Mr. Wooden: I object unless it is confined to cement and even then it is utterly immaterial, and has been
36732 shown over and over again in this case.

Trial Examiner Norwood: The objection is sustained.

Mr. Brick: I wonder if Mr. Wooden would be willing to concede that dealers or purchasers of cement desire delivered prices.

Mr. Wooden: The only question involved here is the question that is pending, and I am willing to concede that freight is a heavy percentage of the delivered cost of cement.

Mr. Brick: Of course, that ignores the point entirely.

Mr. Wooden: That is the question.

Mr. Brick: I think it is fair for the Examiner to ask—

Trial Examiner Norwood: There is abundant evidence in the record to show exactly what part of the prices—

Mr. Brick: Then let it be conceded; if that be the case we do not have to go into it.

Trial Examiner Norwood: I am not going to sit here and hear oral testimony on something that is already in the record. The exact figures are shown with mathematical precision. We are not going to waste any further time on that.

I sustain the objection.

Mr. Brick: Well, why can't—

36733 Trial Examiner Norwood: Let us not argue.

Mr. Brick: Your Honor please—

Trial Examiner Norwood: Stop the record.

Mr. Brick: I beg your pardon, sir.

Trial Examiner Norwood: Stop the record.

Proceed.

Mr. Wooden: Answering Mr. Brick's question more specifically—

Trial Examiner Norwood: I closed his question off. Go ahead.

Mr. Brick: May I make my motion, Your Honor please?

Trial Examiner Norwood: Counsel may make a motion.

Mr. Brick: I move the Examiner request Counsel for the Commission to respond to a request on the part of Respondents' Counsel to concede the point which I previously mentioned in connection with the attitude of purchasers of cement and other heavy products where freight is a large factor in cost.

Mr. Wooden: Whether the Examiner instructs me to or not—

Trial Examiner Norwood: The motion is denied.

I shall give Counsel the privilege of making any statement he wants to about it.

Mr. Wooden: I will make this statement, Your Honor.

Trial Examiner Norwood: Yes.

36734 Mr. Wooden: That in May, 1938, I took the position in New York City that I am taking now, that any buyer is interested in knowing what the commodity was going to cost him laid down at the place he wanted to use it, and to prove that it does not need any proof, I will concede it, but that is a different thing from saying that the buyers want the basing-point system of identically delivered prices.

Mr. Brick: That is not the point I am asking, whether or not the Government Counsel will concede that the purchasers of cement and other heavy produts of a similar character, where freight is an important factor in cost, request of the sellers delivered prices laid down at the purchasers' yard or place of use.

Now, as I see it, the answer to that is either "yes" or "no." If it be "no," why, then, we have to establish it by proof. If it be "yes," we do not have to establish anything.

Mr. Wooden: I would be willing to concede that some dealers, some purchasers, would so testify.

Trial Examiner Norwood: A substantial number of purchasers?

Mr. Wooden: Yes, a substantial number.

Trial Examiner Norwood: Would so testify?

Mr. Brick: And will Government Counsel accept such testimony as representative of the fact?

After all, why let us beg the question. It is a matter of saving time.

Mr. Wooden: I have told you just as plainly as I can tell anybody just what my position is, that any buyer wants to know, and he is interested in knowing, what the cost is at the place he wants to use it.

Trial Examiner Norwood: Now, I will ask Counsel to please close the discussion.

Proceed with the examination.

By Mr. Withrow:

Q. I show you, Mr. McCracken, Respondents' Exhibit 2731, which you said was one of your invoices. I see on there an item of freight, $37.05. Would you tell us whether on receiving the shipment you paid that freight?

A. Yes, we paid the freight and then deducted.

Q. Now, would you look at these invoices, these other invoices, Respondents' Exhibits 2735-D to I, inclusive, and tell me whether or not on these products, as shown by these invoices; you also paid the freight on receiving the shipments?

Mr. Wooden: I object, Your Honor. We are going into the method used in these other industries reflected by these exhibits.

Trial Examiner Norwood: That refers to the excluded exhibits?

Mr. Wooden: Yes.

Trial Examiner Norwood: The objection is sustained.

Mr. Withrow: Your Honor, I think we should be entitled to go into this. It shows, and I propose to show through this and other witnesses, that in the usual course of doing business in this country, in a great number of industries, especially in industries where freight is a substantial amount, that buyers, when they request and receive delivered prices, usually pay the freight on the receipt of the shipment, and I think that has a bearing here because Counsel for the Commission have attempted to show and raise certain inferences because cement companies deduct from their delivered prices the amount of the freight, and have the buyer pay the freight for the manufacturer on the receipt of the shipment, and then send the balance to the manufacturer.

Now, it would develop, and should be clear, that accus

tom and usage in all industries should be admitted here to show that there is no,—circumstantially at least,—that there is no conspiracy, that the whole practice has no bearing upon what constitutes the price, but represents a trade custom in many lines of business, and I would
36737 not raise this point at all but for the fact that Counsel for the Commission have belabored this proof on this point to such an extent and alleged it in their second count, and rely on the fact that the invoices deduct the freight. It seems to me we are entitled to show that is the custom of American business.

Trial Examiner Norwood: You want to show the general custom—

Mr. Withrow: That is right, Your Honor.

Trial Examiner Norwood: —in the heavy industries?

Mr. Withrow: That is right, Your Honor.

Trial Examiner Norwood: For the invoices to show the freight and for the customer to deduct it and pay the balance?

Mr. Withrow: That is it.

Trial Examiner Norwood: Does the Counsel for the Commission deny that?

Mr. Wooden: I do not know what the conditions are in all other industries. I do not doubt, as I said before, but I am willing to concede that some other heavy industries have methods of getting identical delivered prices, and incidentally to that that they have freight deducted from the delivered price and paid by the consignee.

Trial Examiner Norwood: I think that this wit-
36738 ness may tell us his experience about that, as to whether or not that is the usual procedure.

Mr. Wooden: But, Your Honor, it is irrelevant and immaterial. It cannot throw any light upon what the conditions are and the reasons for the conditions in this industry. They may be the same reasons in other industries, they may be different.

Trial Examiner Norwood: Do you wish to draw any conclusion as against these Respondents from the fact that the freight is deducted on the cement in this case in this manner?

Mr. Wooden: Why, yes, Your Honor, I do, but that has nothing to do—we are entitled to go in and try and show similar conditions and similar reasons for the practice in other industries if they go into that, and instead of

trying the cement case to try every other heavy industry case in the country.

Trial Examiner Norwood: You think before this is relevant he will have to show the absence of collusion in the other industries?

Mr. Wooden: Yes.

Mr. MacIntyre: If it is offered for the purpose of showing in those industries there was no collusion, certainly you would have to show absence of collusion there.

Mr. Withrow: I am not offering it to show the
36739 absence of collusion in other industries, and Mr. MacIntyre well knows that. I am offering it for the very simple purpose, to show it is the custom in American business to do business in this manner.

Mr. MacIntyre: As the result of collusion.

Mr. Withrow: May I finish this statement without being interrupted by Counsel for the Commission?

Trial Examiner Norwood: It seems to me we should not branch off on this particular subject.

I am going to sustain the objection and give you your exception.

Mr. Brick: Off the record a minute, please, Your Honor.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: Have you an offer of proof on that now?

Mr. Withrow: I am going to make one, Your Honor.

Trial Examiner Norwood: Yes; do that.

Mr. Withrow: Your Honor, I offer to prove, through the oral testimony of this witness, both independently and based upon Respondents' Exhibits 2735-D to I, for identification, that in the purchase of other commodities, witness requests and receives delivered prices, and that on the invoices which he receives on shipments of commodi-
36740 ties, the delivered price indicates the amount of freight as shown, and upon the receipt of the shipment the witness pays the freight for the account of the seller or shipper, and then pays the balance to the manufacturer or shipper.

Trial Examiner Norwood: Well, can you show that he paid it for the account of? That is a conclusion.

Mr. Withrow: The testimony would show that. I offer to show it.

Trial Examiner Norwood: You can show with respect

to cement to whom he pays the money, and how he deducts it, and how he pays the balance. "For the account of" is probably a legal conclusion; now, we would just like to know how Counsel offers to show that. He may show it, if he can.

Mr. Withrow: I am talking about other commodities, Your Honor.

Trial Examiner Norwood: Oh!

Mr. Withrow: We can show by the terms of the contract and by the statements of this witness as to what his understanding of his legal obligations was. Of course, the courts would have to decide whether or not his conclusion was a correct conclusion.

Trial Examiner Norwood: Well, a part of what Counsel has mentioned there has already been shown by this
36741 witness; and the other parts he has exceptions on.

By Mr. Withrow:

Q. Now, Mr. McCracken, would you tell us how the sales practices of the Louisville Cement Company compare with those of the Kosmos Portland Cement Company, in so far as you are affected and come in contact with them?

A. Both of them are practically the same.

Q. Mr. McCracken, I show you Respondent's Exhibit 2730-A to O, and ask you to look at them and tell us if those are communications which you have received (handing documents to the witness)?

A. These are quotations on cement which we received from different cement companies from time to time.

Q. Is that your source of information as to the price of cement?

A. This and what the salesmen of the companies tell us.

Q. Will you tell us how close contact or touch you keep with the price which is quoted on cement in Louisville?

A. The price quoted to us?

Q. Yes.

A. Of course, we keep very close touch with it. If anybody comes in, any cement salesmen, we ask him if there has been any change in the price, if he knows of any change in the price, and discuss it with him every time he comes in.

I mean, we have to know what the price of cement is
36742 at all times.

Trial Examiner Norwood: You receive those prices through these circulars and through the salesmen; is that right?

The Witness: Yes, sir.

By Mr. Withrow:

Q. Do you keep those quotations that are sent to you on file in your office?

A. We keep some of them; we don't keep all of them. They get into the file, and we are not very careful with the filing.

Mr. Withrow: Your Honor, I offer in evidence at this time Respondents' Exhibits 2730-A to O (handing the documents to Counsel for the Commission).

Mr. Wooden: Objected to as irrelevant and immaterial and necessarily cumulative, and showing nothing but what has been shown hundreds of times in this case.

Trial Examiner Norwood: Will Counsel concede that these are similar to hundreds of other such things that are already in evidence?

Mr. Wooden: Yes, sir.

Trial Examiner Norwood: Objection sustained.

Mr. Withrow: Your Honor, there are price quotations there by a number of companies, none of whose quotations are in, and on which, if we received these at this time, we would have the terms and conditions of those com-
36743 panies. I am quite anxious to press the offer of them.

Trial Examiner Norwood: Do you think that will save the necessity of—

Mr. Withrow: I think it will save some time.

Trial Examiner Norwood (Continuing): —of putting the others in?

Mr. Withrow: Yes.

Trial Examiner Norwood: At some other time?

Mr. Withrow: Yes, Your Honor.

Trial Examiner Norwood: Will Counsel make a note of that?

Mr. Wooden: If it is understood that in case other dealers were called, similar offers will not be made of this kind of stuff, I will not object; I will withdraw my objection.

Mr. Withrow: If it is conceded by Counsel for the Commission that they will receive this source of price information, of course, we have no desire to re-prove the point.

Mr. Wooden: Well, that same thing has been proved long before.

Trial Examiner Norwood: The exhibits will be received, then, under the circumstances as indicated by Counsel's statement.

Mr. Wooden: I want it understood that my ob-
36744 jection still holds, and is insisted upon, unless it is understood that similar data will not be presented through other dealer witnesses.

Mr. Withrow: If Mr. Wooden will meet my concession, I will agree with him.

Trial Examiner Norwood: Counsel may understand that I expect to exclude them each and every time they are offered.

What is the number of that exhibit?

Mr. Withrow: 2730-A to P.

Trial Examiner Norwood: They were marked yesterday afternoon?

Mr. Withrow: They were marked yesterday afternoon, but they have just been offered at this time.

Trial Examiner Norwood: Exhibits 2730-A to P are received as marked.

(RESP. EX. 2730-A to 2730-P was offered and received in evidence.)

By Mr. Withrow:

Q. Mr. McCracken, I show you Respondents' Exhibit 2728-A to X, and Respondents' Exhibit 2729-A to Z-2, and ask you to tell us what they are?

A. They are copies of American Builders invoices to the customers, chiefly on cement, and a few other
36745 products, where they appear on the same invoice. That is all the cement sold on that date (indicating), and this was all the cement sold on another day.

Trial Examiner Norwood: These are your invoices to your customers?

The Witness: Yes, sir.

By Mr. Withrow:

Q. Are those dates typical of the day's business?

A. They were taken at random in the busy season. One is in May and one is in September, when we are busy.

Q. Do you sell cement at wholesale or retail quantities?

A. That is hard to say, whether it is wholesale or retail. We sell from one sack to a good many carloads.

Trial Examiner Norwood: Do you sell at the same price to all of your customers?

The Witness: No, sir.

Mr. Withrow: Your Honor, I offer in evidence at this time Respondents' Exhibits 2728 and 2729, with the appro-

priate subpurchasers (handing the documents to Counsel for the Commission).

Trial Examiner Norwood: What is the importance of this?

Mr. Withrow: I would like to show through this witness the type of business that a dealer does, and the reason for going into it is that Counsel for the
36746 Commission has taken the position, and maintains it, that a cement company should go into the retail business, and should supplant the dealer. That is a summing up of the effect of their position, and I would like to show, and this is part of the proof, that a cement company is not in a position to render the service and carry on the functions that a building supply dealer does carry on for the manufacturer, and that it is done at a considerable saving to the public.

Mr. Wooden: I want the record to show that I resent such reckless misstatements of my position as Counsel has just made. I have never taken such a position.

I object to these pending offers of exhibits as wholly irrelevant, incompetent, and immaterial, and as having nothing to do with the issues of the case.

Trial Examiner Norwood: Objection sustained. I think that Counsel's point has been well covered, anyway.

Mr. Brick: The statement on the record, as Mr. Wooden would have Your Honor to believe, that that is one of the points that he tried to cover through the economists—

Trial Examiner Norwood: Well, I am not responsible for Counsel's position in the matter, but those invoices of this dealer to the customers are incompetent, irrelevant and immaterial.

36747 Go ahead.

By Mr. Withrow:

Q. Mr. McCracken, do you perform any services for cement manufacturers?

A. Yes, sir; we sell for them and collect for them. We create a good deal of business for them. We warehouse and distribute their products.

Trial Examiner Norwood: You perform the usual services of a dealer; do you?

The Witness: Yes, sir.

By Mr. Withrow:

Q. Will you tell us if you perform any services for a

manufacturer in the case of business which does not physically pass through your warehouse?

A. We feel that we do, in making a sale to the contractor, and seeing that the shipments go to him in a regular order, and keeping him up with his requirements.

Q. Now, have you ever objected to any manufacturer because he was making sales to companies which you did not believe were building supply dealers?

A. Yes, we have discussed it with different manufacturers at different times on different people, that we felt a certain person who was not a dealer, that he was simply coming into the market and gaining some advantage on one particular job, and would go out of the business, and
36748 he was simply taking our business away from us when he was not really going to stay in the business.

Q. How many building supply dealers are there in Louisville?

A. From ten to fifteen.

Q. And how many ready-mix companies?

A. There are four ready-mix companies.

Q. Will you tell us whether or not these building supply dealers and ready-mix people solicit the same business, generally, as you do?

A. Yes; all of them.

Q. Now, Mr. McCracken, have you ever asked any cement manufacturer for the right to go to that manufacturer's mill and get cement and load it on your trucks?

A. No, we have not.

Q. Does your company own or operate any trucks for the delivery of cement from cement mills?

A. Not from cement mills. We deliver cement from our warehouse all over town.

Q. Well, have you ever received cement by trucks delivered to your plant?

A. Occasional emergency shipments only.

Q. What is the maximum load of a truck of cement at any time?

A. Under the State law of Kentucky, you can only carry a gross load of 15,000 pounds, all told, truck and cement.

36749 Mr. Wooden: I am too late to object, Your Honor, but I move to strike the question and answer as being irrelevant and immaterial. The issue in this case

is not what restrictions the State governmental authorities put on the truck, but what restrictions the Respondents put on trucking.

Mr. Withrow: May I call Your Honor's attention to and read from the complaint exactly what the complaint does say? It says: "Customers"—

Trial Examiner Norwood: That will be entirely unnecessary.

Mr. Withrow: Well, it says—

Trial Examiner Norwood: Inasmuch as the objection came after the answer, I shall overrule it, and deny the motion, but Counsel's point is well taken, and I will exclude anything further along that line.

Mr. Brick: Which Counsel?

Trial Examiner Norwood: Go ahead.

By Mr. Withrow:

Q. Mr. McCracken, are you especially equipped in any way to handle deliveries of cement to your plant by rail?

A. Yes, we are equipped to handle by rail only, both at our mixing plant and at our warehouse.

36750 Q. Mr. McCracken, did you ever attend any joint meetings between cement manufacturers, dealers, and contractors, at which the subject of trucking cement was discussed?

A. No, sir.

Mr. Wooden: I will concede, Your Honor, if it will help any, that hundreds of dealers that may be produced as witnesses will testify to the same effect.

Mr. Wooden: I am willing to concede that thousands or millions of people did not attend such meetings.

36751 Q. Mr. McCracken, is your not requesting shipments or going to the mill to take cement for delivery by truck, the result of any understanding or agreement between you and any group of cement manufacturers?

A. No, sir; it is not.

36753 Q. Now, you have referred to certain differences in cement. Have you found that Portland cement is a standard product, Mr. McCracken?

A. Yes, it all passes the required tests.

Trial Examiner Norwood: What is that?

By Mr. Withrow:

Q. Would you pay a cent more for one brand of cement than for another?

A. No.

36754 Q. Now, Mr. McCracken, in the event of a change in the price of cement that you are quoted, do you discuss that change with the salesmen of cement companies that call on you?

A. If we get a change in the price of cement from some manufacturer with whom we do not normally do business, we will take it up with our normal sources of supply and ask them if they are going to meet the proposition, and we would like to keep on doing business with the same people that we normally do business with, and at an equal price we wouldn't change, and if they would meet the change we would continue to do business with them.

Q. In the event of a price increase, Mr. McCracken, are you given some advance notice of the increase before it becomes effective?

A. Usually we get a notice that the price of cement will be advanced in so many days. That is almost necessary to us, in that quite often we don't go to the trouble of making out written contracts with cement companies, although we may be serving a project that is going to go on for a year or two, or we have to get contracts on those to complete that job at that price.

Q. Then you enter into some specific sales contract; is that right?

36755 A. That is correct.

Mr. Withrow: Your Honor, one of the collateral issues that Counsel for the Commission brought up in this case was the fact that the United States Government was a more satisfactory purchaser than other purchasers. I think it would be interesting to have the facts in the record, so that we could compare from the records in this case, and see whether the United States Government is a more satisfactory purchaser, and we now have a purchaser on the stand, who can testify as to what he does do.

Trial Examiner Norwood: I certainly am not going into any issue as to whether or not the Government is a better customer than somebody else. That is out of this case, so far as I am concerned.

Objection sustained.

36757 By Mr. Withrow:

Q. Mr. McCracken, have you ever discussed with any individual cement manufacturer the methods in which

he sold the various types of business, whether direct or through dealers?

A. Yes, we have.

Q. Under what circumstances?

A. Sometimes, when we thought that certain sales should be made through dealers rather than direct,
36758 we have taken it up with the manufacturer at that time.

Q. Now, did you take this up with your individual sources of supply or with a group?

A. Only with the manufacturer with whom we were dealing.

Q. And what were the results of those statements by you?

A. Sometimes we succeeded in getting a manufacturer not to make a sale direct, and sell through us, and sometimes we didn't succeed.

Q. Was one of the matters discussed with you the question of selling the W.P.A. direct or through dealers; do you recall?

A. I don't believe we ever have discussed that.

Q. Now, Mr. McCracken, do you know of any instance where a manufacturer has sold cement at a price higher than the lowest quoted price in the Louisville market?

A. No; I don't know of any place where a manufacturer sold cement at a higher price than cement was being offered.

By Mr. Withrow:

Q. Now, in the carrying on of your business, Mr. McCracken, will you tell us whether you find that the sale of cement competes with the sale of other building materials?

36759 A. Yes, sir; it does.

Q. Will you tell us how the price of cement compares with that of other building materials?

Mr. Wooden: Your Honor, I object to that as wholly irrelevant and immaterial. There is no basis of comparison—per pound, or what?

Trial Examiner Norwood: That is going to the reasonableness of the price, I think. We had to leave that out, because there are so many ramifications. The objection is sustained.

Proceed.

36762 By Mr. Withrow:

Q. Would you tell us whether or not in the event of a decline in price you increase the amount of cement which you purchase?

A. No, we do not, on a decline.

36763 Q. Would you tell us what your experience has been in the amount of cement you re-sell after a reduction in the price of cement?

A. It does not affect the amount at all.

Q. Would you tell us, Mr. McCracken, what the facts are as to the relative sizes of your purchases or commitments which you make at the time of an increase in price?

A. At the time of an increase in price of cement, we usually give them so many days to ship at the old price, and we fill our warehouse and our bins with the low price cement, and we get our contracts covered at the old price.

Q. So that would be an increase?

A. It would be an increase in the immediate shipments.

36764 Q. I mean where manufacturers were offering to sell cement to you and refusing your request.

A. There has never been a time we could not get all the cement we wanted.

Q. Has there ever been a time when you could not get all the cement you wanted from the Louisville Company?

A. No, there has not.

Cross-Examination by Mr. Wooden.

Q. Mr. McCracken, have you found that the delivered prices of the various manufacturers of cement on standard cement are the same delivered at your destination, the same kind?

A. They become the same very rapidly. We get a quotation from anybody, why, it—cement may drop, but in a few days those with whom we deal meet the price.

Q. And isn't it true that over long periods of time the delivered price of cement in Louisville has not changed?

A. The price of cement changes every once in a while.

Q. Haven't there been periods of as much as a year, or even more, without change?

A. I would say about a year would be the maximum. I cannot remember exactly.

Q. And when a change in price does take place,
36765 delivered in Louisville, you do not know whether it is on account of freight rates or for some other cause, do you?

A. No, sir.

Q. So it may be that there is no change in the price at the mill, but a change in the freight rates caused the change in the delivered price in Louisville; that is right, isn't it?

A. When a price changes I do not know why it changes.

By Mr. Wooden:

Q. In other words, it may be changed because of freight rates, and you would not know whether that was the reason or not?

A. I would not have any idea why the price changed.

36766 Q. Now, will you explain why it is that you, as a dealer, prefer buying at delivered prices?

A. Because that is what we are interested in, is our cost at our point of delivery, and we do not want to be bothered with hunting up tariffs. We have nobody who is able to trace down freight rates and keep track of changes in freight rates. We have no interest—I mean, we have no— We would have to do a lot of work to keep track of the changes in the rates.

Q. Is that the only reason?

A. And because we want to know what our cost is at our plant.

Q. Is there any other reason?

A. No, sir.

Q. You are interested in whether your delivered cost from one manufacturer is lower than your delivered cost from another?

A. Of course, we compare our cost from one—taking cement, or brick, or anything else, we compare the cost in Louisville.

Q. Why do you do that?

A. Because that is what it would cost us.

Q. Well, you do it, though, do you not, because you would be interested in knowing whether one of them made a lower delivered cost than another, don't you?

A. Yes, sir.

Q. So when you say that you prefer delivered prices,

you do not mean that you prefer delivered prices
36767 if they are identical, do you?

A. Please read that question.

Trial Examiner Norwood: Read it.

(Question read.)

Mr. Withrow: Your Honor, I object to the question.

Trial Examiner Norwood: The objection is overruled.

Mr. Withrow: It is not relevant and material; it is just arguing with the witness, and beyond the scope of the direct examination.

Trial Examiner Norwood: The objection is overruled.

A. We prefer delivered prices; they may or may not be equal.

By Mr. Woodon:

Q. Well, do you prefer them to be the same from all producers of cement?

Mr. Withrow: Same objection.

Q. Delivered at Louisville.

Trial Examiner Norwood: Same ruling.

A. We prefer a stable price to a price that is varying.

Trial Examiner Norwood: Well, answer his question with regard to whether or not you would prefer them to be identical—

Mr. Brick: He has answered it.

Trial Examiner Norwood: Whether or not you would prefer them to be identical from the different manufacturers.

36768 Mr. Withrow: He answered it two or three times.

A. I said we prefer a stable price.

By Mr. Wooden:

Q. Do you mean by that that you prefer a delivered price on cement that is the same from all your sources of supply no matter where located?

A. Well, if it was not the same we would not buy but from one company.

Q. You would buy from the one that was lowest, wouldn't you?

A. Yes, sir.

Q. And you are interested in the one which is lowest?

A. I do not quite understand the question.

Q. I still want to know whether you,—when you say you want a stable price,—whether you mean a price that is the

same delivered to you at Louisville from all cement manufacturers.

A. We do not want the prices of cement to go up and down. We would buy cement from whatever mill sold it to us the cheapest. We would not pay one cement manufacturer any more than we would pay another manufacturer.

Q. You would be glad to get it for less from one manufacturer than another, wouldn't you?

A. We would always buy from the cheapest manufacturer.

Q. Aren't you interested in getting it at the lowest possible delivered cost?

A. Well, my competitor would buy at the same
36769 price. It would not make much difference.

Q. In other words, what you are concerned with is whether you are buying as cheaply as your competitors; isn't that right?

A. That is right.

Q. And nothing else matters to you; does it? In other words, whether the price is one level or another, just so you and your competitors buy at the same delivered price, that is all you are interested in, isn't it?

A. Certainly. I do not want my competitor to buy for less than I do.

Q. That is all you are interested in, isn't it, whether you and your competitors are on the same delivered cost basis in Louisville?

A. I am interested in knowing that I am buying cement as cheap as any of my competitors.

Q. You are not interested in buying any cheaper than your competitors?

A. I would like to; but I do not think I am that smart.

Q. In buying cement anyway?

A. Or any other product.

Q. You never think you can buy anything any cheaper than your competitors?

A. Not for any length of time. They find it out.

Q. But sometimes you can for some length of time?

36770 A. Oh, for momentarily.

Q. You do not find that you can buy cement any cheaper than your competitors in Louisville, even momentarily?

A. I do not believe I have for over any period of time, anyway.

Q. Well, do you want delivered prices that are the same as the delivered prices made by all shippers or producers of cement?

Mr. Withrow: Your Honor, I object. That question has been asked six times and answered six times.

Trial Examiner Norwood: The objection is overruled. I do not think the witness has answered it directly.

Mr. Brick: He said it did not make any difference.

Trial Examiner Norwood: Answer the question.

Mr. Withrow: Read the question.

(Question read.)

A. I still have to answer that the same way I did before, that we would buy from the cheapest quotation we had.

Trial Examiner Norwood: Well, do you want that condition or do you not want it? Say "yes" or "no."

36772 The Witness: If I have to answer "yes" or "no," the answer would be "yes."

By Mr. Wooden:

Q. You want the delivered prices—so there will be no misunderstanding, you want the delivered prices of cement in Louisville to be the same from all producers of cement?

A. Because then I would not have to worry about

36773 my competitor getting a cheaper price.

Q. Your answer is "yes," and that is the reason.

A. That is correct.

Q. Now, you say you are also interested in getting the lowest possible delivered price.

A. Yes, sir.

Q. But it so happens in cement that the lowest possible delivered cement price has been the same from all manufacturers: is that right?

A. Over any period of time.

Q. Are you interested in getting cement delivered to your yards through the cheapest kind of transportation?

A. We are interested in getting any product delivered to us, what turns out to be the cheapest for us in the end.

Q. Have you ever endeavored to get cement delivered to your yard by trucks?

A. No, sir.

Q. I believe you said something about getting some emergency deliveries once in a while by truck.

A. That is right.
Q. That is in your own trucks?
A. No, sir.
Q. Whose trucks were those?
A. I don't know who the truck belonged to. The cement company had the cement brought to us.
36774 Q. Were such cases deliveries to your yard or to the job?
A. To the yard.
Q. And you paid the same delivered price as though it had been delivered by rail in such cases, did you?
A. Yes, sir. There were very few of those cases.
Q. Did you ever attempt to get any cement delivered by water to Louisville, and then from the waterfront to your yard?
A. No. We would not be equipped to handle it that way.
Q. You unload, do you not, or are you on a side track of a railroad?
A. Yes, sir.
Q. And you are not on the river?
A. No, sir.
Q. Or any branch of the river?
A. No.
Q. Did you ever make any inquiry to see if you could get cement delivered to Louisville by water, and what the cost of it would be delivered there by water?
A. No, I did not. We buy other materials by barge, but we are not equipped to handle what would be in my mind a barge load of cement. We would not be able to handle that large quantity.
Q. You never had any interest in whether you and other dealers combined might get a barge load of cement?
A. We never combine with any dealer about any
36774 thing. We do not get along with our competitors.
Q. Did you ever hear of cooperative buying?
A. I have heard of it, but I do not know a darned thing about it.

By Mr. Wooden:

Q. Has it been your custom when manufacturers reduce the delivered price of cement at Louisville to immediately make the same reduction in your prices to consumers?
A. Approximately the same reductions. If we did not,

we would not get any business. We do not reduce it until we have to.

36776. Q. And sometimes you don't have to immediately, do you?

A. We would on a carload shipment. We would not on a single sack.

Q. Well, on the small lot business, a reduction in the delivered price to you does not involve immediate reduction to your customer, does it?

A. If the price of cement went down to us a penny or two a barrel, there would not be any change in the small lot business for some time, if at all. If cement went down ten or twenty cents a barrel, the reduction in price to the small consumer would be immediate.

By Mr. Wooden:

Q. When the delivered price of cement in Louisville to you goes up, is that followed usually by a mark-up
36777 of the same amount in your price to your consumer?

A. It would not be identical mark-up on truck load stuff very often, because—

Q. There would be some mark-up.

A. Yes. If it cost me more, I have to get more for it if I want to stay in business.

Q. In other words, you figure your margin on a percentage, or how do you handle it?

A. Oh, we figure from the cost and try to add some profit.

Q. Now, what services do you perform for manufacturers when they sell and ship in carload lots direct to the job or to your customer?

A. If they sell and ship I do not see where I would perform any service; but I do not know of that happening. We make the sale if we have anything to do with it, so we have at least performed the function of a salesman; we carry the credit, and we service the job.

Q. Are you performing those services for the manufacturer and not in any sense performing them for yourself?

A. Of course, we are performing them for ourselves; the manufacturer profits by it.

Q. You are doing it primarily for yourself?

A. We do business in our own name, and we buy from whomsoever we please.

Q. In other words, the services you perform
36778 there are primarily for your own benefit and incidentally for the manufacturer's benefit; is that right?

A. We are in business to make money, and we go out and try to buy something, and we turn around and sell it; the same with cement as any other product.

Q. You say there are some ten or fifteen building material dealers in Louisville.

A. Yes, sir.

Q. Do you class all those as regular building material dealers?

A. I do not know what you call regular building material dealers. None of us deal in all the same products, if that is what you mean.

Q. Well, are there any more concerns in Louisville that handle cement at retail than, say, ten or fifteen dealers that you mention?

A. Yes, sir; some of the lumber yards.

Q. Are there some building supply concerns besides the ten or fifteen that handle cement?

A. I believe ten or fifteen would cover it.

Q. Of concerns handling cement in Louisville at retail?

A. No. If you add the lumber yards in, there would be something more than that.

Q. Aside from the lumber yards.

A. Aside from the lumber yards, I do not be-
36779 lieve there are more than fifteen.

Q. Now, you testified on direct that you had discussed with some of your sources of supply in cement, the one of their selling to the dealers, that you did not think they ought to sell; is that right?

A. Yes, I testified, I believe, that I had discussed with the manufacturers selling someone at a dealer's price that we thought was not a dealer, was a consumer.

Q. Did you have some cases where the party so discussed was selling cement at retail?

A. Well, of course, the discussion was that the man would claim that he was selling cement, but our contention was, as a matter of fact, he was using it himself only, in the cases that we complained of to the manufacturer.

Q. Weren't there some cases where he was selling some and also using some for his own purposes?

A. Well, but the amount he sold was practically nothing.

Q. He was selling some?

A. He may have been selling some.

Q. Would the percentage that a man sells, is that in your mind what determines whether he is a regular dealer, or not?

A. No, it would not be the percent of what he handled that determined whether he was a dealer; it would be whether he was regularly in the field soliciting business and had the equipment to warehouse it and handle it, and some finances, and knew something about what he
36780 was doing.

Q. Has your company been a member of any building material supply dealers' association?

A. The only time we were ever a member of any dealers' association at all is when we were forced to during the Code. As soon as the Code was over we quit.

By Mr. Wooden:

Q. Were you a member of the Kentucky Builders' Supply Association?

A. I think that was the name of it during the Code.

Q. And during what period of time were you members?

A. Well, while the Code was in effect.

Q. Well, can't you give me the date?

A. It was somewhere along about from 1933 to 1934, somewheres along back in there. I do not remember the date. You know when the Code was in.

Q. Were you a member of any organization before that time, or since?

A. No, sir.

Q. Has any member of your firm been represented in builders' supply dealers' association activities?

36781 A. No, sir.

A. Nobody in our company is a member of any building material dealers' association of any character.

By Mr. Wooden:

Q. Have you ever joined with any of your dealer competitors in discussing the status of these dealers that you thought your source of supply ought not to recognize as dealers?

A. No, sir.

Q. Now, you said on direct that all cement that
36782 you handled from different companies was stand-

and and passed the requirements. Do you know what the tests are?

A. Passed the A.S.T.M. requirements of Portland cement.

Q. Do you know whether or not the extent to which the various brands of standard cement exceed the A.S.T.M. requirements?

A. I know that some of them do, yes. In our ready-mix plant we test all of our cement, and when we are on a strength proposition we base strength, the result on the cement that we are using.

Q. Do you find that varies between the different brands of standard cement?

A. It varies some.

Q. Do you advise your customers as to how much variation there is between the specifications or the amounts by which the different brands of standard cement exceed the A.S.T.M. specifications?

A. No, we do not.

Q. Now, you said on direct that the sales practices of the Louisville and Kosmos companies were practically the same. What differences do you have in mind?

A. In the personnel and the way they go about soliciting business, and so forth, is all.

Q. You mean the personality of the salesman, or what?

A. That is what—

Q. That is what?

30783 A. That is what I meant, the difference was—the difference—nobody does business exactly the same. Their policy is the same—I mean, so far as their price is concerned.

Q. Did you have anything else in mind when you said that their sales practices were practically the same?

A. No, sir.

Q. Does the same thing go for your other source of cement supply?

A. Of course, we know those two much better. They are right there in Louisville; others, you can only see—

Q. So far as you know the others, would your same testimony apply?

A. Well, it would in some ways. I mean one company will help us more to sell a job than another one will, and some are rather indifferent.

Q. Is that the only difference you have in mind?

A. Don't give us any leads, or help, or things of that character.

Q. Is that the only difference you have in mind?

A. Yes, sir.

Q. Now, when you were invoiced for cement, as shown by these exhibits produced by you and received in evidence, and deducted the freight, does that mean that you paid the freight to the railroad company and remitted the balance to the cement manufacturer?

36784 A. Yes, sir.

Q. What process do you go through when you pay the freight to the railroad company? What do you say or tell the railroad when you pay the freight?

A. We send them a check for the freight.

Q. Do you say anything about it, or just simply send them a check?

A. We get the freight bill and send them a check.

Q. Do you say anything about paying it for the account of the shipper?

A. No, sir.

Q. Did you ever hear of that practice?

A. Did I ever hear of what practice?

Q. The practice of the cement buyer paying the freight to the railroad for the account of the shipper?

A. We have never—we do not care what the freight is, I mean, we never check the bill, or anything, because whatever it is we take it off the cement company.

Q. Suppose there were a difficulty in getting cement in Louisville for some reason, and you had a car consigned to you from one of the shippers that you had placed an order for, and accepted, and the car was on the way to you, and before it reached you the shipper turned it over to one of your competitors. Would you think that was in accord with the conditions under which you placed the order?

36785 A. If I had ordered some cement and did not get
36786 it when it had been promised to me, regardless of why I did not get it, I would fuss at the person that I bought the cement from.

By Mr. Wooden:

Q. Would you consider that car of cement that way, you had a bill of lading for your cement at the time it was en route to you?

A. I do not know what the legal nature of that would be; I would not know.

Q. Well, in view of your previous answer that if you wanted cement and placed an order for it and did not get it, you would make a fuss, would you make all the more fuss, wouldn't you, if the car had actually been consigned to you and you had a bill of lading for it?

36787 A. It would not make any more difference to me if I had the bill of lading or did not have it. If I did not get the cement I would not have it.

By Mr. Wooden:

Q. You would make a fuss.

A. Sure, whether I had a bill of lading, or did not.

Q. I believe you said on direct that 90 percent of all the purchases of material that you made were bought on a delivered price basis; is that right?

A. I said I thought it would be about 90 percent.

Q. Is that as to number of commodities bought or in the value bought, or what?

A. In value.

Q. As to number, what would be the percent?

A. It would be higher than that.

Q. Higher?

A. Yes.

36788 Q. How does it happen, Mr. McCracken, that you have come here as a witness?

Mr. Withrow: Your Honor, I object to the question. I do not think it is material or relevant to any of the issues in the case. He may ask him whether he was subpoenaed. That is legally correct. Beyond that, I do not think he has a right to go. It has no bearing on the issues in this case whatsoever.

36789 Trial Examiner Norwood: Can you bring out the fact as to whether he is a volunteer witness, or not? I think you may do that.

Mr. Withrow: He can ask him if he was subpoenaed, and that settles it.

Trial Examiner Norwood: The objection is overruled.

A. I was not subpoenaed.

By Mr. Wooden:

Q. I ask you how did it come about that you came?

A. Mr. Withrow asked me if I would come here and tell

what I knew about handling cement, and so forth, as a dealer.

Q. Did you have any contacts in that connection with any of your sources of supply of cement?

A. Yes, sir; I talked with one of them.

Q. Who?

A. Kosmos Cement Company.

Q. Who there?

A. One of the sales managers.

Q. Who?

A. Mr. Clark.

Q. Was he also requested to appear as a witness?

A. He was the one that asked me to talk with Mr. Withrow. After I talked to Withrow, Withrow asked me if I would come as a witness, and I told Withrow yes.

Q. Had you ever discussed with Mr. Clark, or any
36791 of your other sources of cement supply, the basing-point method of quoting delivered prices?

Mr. Withrow: Your Honor, I object to that question. The matter was not gone into on direct examination, about the basing-point method of quoting prices at all. It is entirely beyond the scope of the direct examination, and not material or relevant to any of the issues here.

Trial Examiner Norwood: Objection overruled. It goes to the interest of the witness here, I think.

A. I have not discussed basing points with anybody, because I don't know where they are or what they are.

By Mr. Wooden:

Q. Was it explained to you what sort of a case you were asked to testify in?

A. No, sir.

Trial Examiner Norwood: How is that?

(Answer read.)

By Mr. Wooden:

Q. Do you mean to say that you did not even know that the Kosmos Company, or any other of your sources of supply, was made a respondent in this proceeding, alleging them to be in combination?

A. When I answered "No," I meant I had not discussed any of the—with anybody, any of the details. I knew that there had been some kind of action brought. I knew
36792 that from my own knowledge; I had seen it in the newspapers—an action brought against some cement

companies for—I don't know what it was; restraint of trade, or something of that character. I was asked that by Mr. Withrow. He said you know about that case, and that is all there was—no discussion as to the details of the case in any way, and I have never seen anything about it.

By Mr. Withrow:

36794 Q. Now, Mr. Wooden asked you about the strength of various cements, and how they compared. What has been your experience on most jobs; is the strength of various cements, or only of certain cements, strong enough to bring you the business?

A. Any cement that we have had in years will pass any of the required tests to be used on a job.

Q. Well, are you willing to bid as much as a penny more for one cement than for another, because one
36795 cement is stronger than another?

A. No, sir.

36796 *Recross Examination by Mr. Wooden.*

Q. If you could get cement at a lower price from one shipper than from another, would you not be content to reduce the number of sources of supply in order to get the lower price?

A. If I could get a lower price from one manufacturer than the other, and it was not a person or one of the people with whom I was normally doing business, I would take it up with the person with whom I was normally doing business, and if he didn't meet the price, then I would buy it from the other fellow.

Q. But would you not be willing to forego some of your sources of supply if you could get a lower price by so doing—a lower delivered cost by so doing?

A. What do you mean—if they would have a
36797 combination of cement companies, and by that it would give me a lower price, or something? I don't follow you.

Q. No. Say you are buying from eight or ten manufacturers today. Would you not be willing to confine your purchases to two or three of them if those two or three gave you a lower delivered price than the others?

A. If they would, I would have to confine it to them, if the others didn't meet it.

Q. You would want to.

A. I would want to what?

Q. Buy your purchases from the two or three that gave you the lower price than the others—not merely from choice, but you would have to.

A. We buy it from the ones that are cheaper.

Mr. Wooden: I do not care whether the witness is discharged or not, but this is, as near as I can get it, the first dealer witness that the Respondents have produced, and I want to say now that we are perfectly willing to concede and stipulate that if other dealer witnesses were called they would give their testimony to the same effect as
36798 this witness has given yesterday and this morning.

Trial Examiner Norwood: Would that be acceptable to the Respondents?

Mr. Withrow: To some extent it would be.

Trial Examiner Norwood: That is, as far as it relates to the subjects to which he has testified here.

Mr. Brick: As to some of the subjects to which he has testified.

Mr. Withrow: It is only fair to point out to Your Honor that this witness, Mr. McCracken, is from Louisville, and he has testified as a dealer from Louisville about the problems that he faces in Louisville.

Trial Examiner Norwood: Yes, I understand that.

Mr. Withrow: I can see Mr. Wooden getting excited about the possibility of calling dealers from every destination in the United States. I do not mean to imply that, but the mark-ups are different in different localities. We will cooperate with Mr. Wooden as far as possible, but we do not want to foreclose ourselves from calling other witnesses to testify about situations which differ from the situations as given in the testimony of this witness.

36800 CHARLES HORNER was thereupon recalled as a witness for the Respondents, and, having been previously sworn, testified further as follows:

Direct Examination.

36801 It is hereby stipulated that if Charles Horner, president of the Kosmos Portland Cement Company (hereinafter referred to as "Kosmos" or as the "Company"), were to testify on his direct examination with respect to the matters hereinafter indicated, he would give as

his testimony with respect to those matters the statements hereinafter set forth:

36802 A. Background of the witness:

I became associated with Kosmos in 1907 and have remained associated with that company ever since. I have been president since about 1923.

36803 B. Organization of the Kosmos Portland Cement Company:

The Kosmos Portland Cement Company is a Kentucky corporation, with its principal place of business at Kosmosdale, Ky. The company has sales offices at Louisville and Cincinnati. Kosmos was originally organized in 1904.

Kosmos now owns and operates one mill. This is located at Kosmosdale, Jefferson County, Kentucky. It operates warehouse facilities at Cincinnati.

The Kosmos plant is a modern, up-to-date economic plant. The plan is capable of producing about 1,175,000 barrels per year. It is a dry process mill. It secures its limestone from a quarry 27 miles away. The limestone is transported to the mill by barge. There is limestone at the mill also but it is not as suitable as the stone we bring in by barge. The clay is secured from a bed which is near the Kosmos plant. The fuel is obtained from Kentucky and West Virginia; the latter is brought by barges and the gypsum is obtained from Michigan.

Kosmos has had the policy of keeping its mill up-to-date and it usually has some modernization work in progress all the time. Kosmos has attempted to make improvements so as to reduce costs and as a result there is now hardly any part of the original mill left. Among the improvements which have been made have been the installa-
36804 tion of waste heat boilers and special unit pulverizers for each kiln. These and other improvements have been made at considerable cost but were necessary and advisable to maintain the Kosmos mill as an up-to-date and economic mill.

Kosmos manufactures standard Portland cement, masonry cement and a high early strength cement.

To my knowledge, no cement manufacturer holds any stock in the Kosmos Portland Cement Company and Kosmos holds no stock in any cement manufacturing company. None of the officers or directors of Kosmos are officers or directors in any other cement manufacturing company.

The company is not affiliated in any way with any other cement manufacturing company and does not have any working agreement with any other cement manufacturing company by virtue of which one company supplies the orders placed with the other company.

The Kosmos mill is located on only one railroad, the Illinois Central.

C. Sales Territory:

The Kosmos Portland Cement Company normally solicits and ships cement into territory bounded by Logansport, Ind., on the north, to Nashville, Tenn., on the south, the Mississippi River, on the west, to the West Virginia line on the east. Occasional shipments are made beyond. There are comparatively few large markets for cement in this territory.

36805 In determining the area in which we will normally solicit business, we consider the following: (1) the freight rate, (2) the volume of business available in the territory adjacent to our mill, (3) the mill net we would realize, (4) the cost of securing the business, (5) the volume of business available in a distant market, (6) the service Kosmos is able to render in comparison with the service from competing companies, and (7) the long-term or future relationship with purchasers in that market. For this reason we are often ready to ship into territory outside of the area in which we solicit, but it is a territory in which it would not be profitable for us to exert any sales effort.

We do not set a minimum mill net figure below which we will not go in handling our sales. Each prospective order, when it comes in, is handled on its own merits. If the net is too low to suit us under all the circumstances, it is not accepted. In determining whether an order will be accepted there are many factors to be taken into consideration, such as the customer requesting the shipment, the freight rate to the destination, the volume of business booked under other contracts and the amount of shipments made by us during that shipping season. The element of the service which we are in a position to render tends to discourage distant shipments.

One of Kosmos' best markets is Louisville, and others are Cincinnati and Evansville. Most of the sales by
36806 Kosmos are made to small dealer accounts, which dealers are located in the small towns.

At all of the large consuming points in the sales territory, Kosmos finds ten or more competing companies actively engaged in soliciting and selling cement. At many of the points in Ohio there are around twenty competing companies.

Kosmos sometimes follows a contractor out of its normal sales territory if the job is attractive and in order to maintain its connection with that contractor.

Generally speaking, Kosmos tries to keep its contacts with all the trade it has shipped for a number of years, in an effort to hold its trade and to maintain its position with those dealers and customers where it has built up good will as a result of time and money expended by the company.

We did not solicit business in Mississippi in 1925.

D. Method By Which the Kosmos Portland Cement Company Obtains Information As to Competitors' Prices and Methods of Marketing:

The Kosmos Portland Cement Company obtains its information concerning the published and unpublished prices of its competitors by means of information picked up in the field by its salesmen. Its salesmen operate under instructions to transmit to the home office immediately any changes in the competitive practices or prices which
36807 they may find or hear of in the field. Kosmos has found that friendly dealers are willing to turn over to our salesmen, copies of price quotations received from our competitors. Its salesmen send to the home office all quotations of price changes or announcements of policy changes that they can pick up in the hands of customers. Kosmos also gets much information of competitive moves directly from such customers by way of telephone calls or letters. Another source of such information is tabulations of bids submitted to governmental agencies which are obtained by salesmen who attend the lettings, or from reports of the bids published in newspapers and other periodicals.

It does not take a very long time for Kosmos to get news of changes in competitive prices or policies. In most markets such information is obtained almost as soon as the competitive announcements are in the hands of the consuming trade. In all cases, the lapse of time is very short, and never more than a day, before Kosmos is fully

apprised of competitive moves through the information which its salesmen are able to obtain in the field. Commodity prices published in newspapers and trade journals are also a source of information which is considered occasionally along with information acquired through its salesmen.

Kosmos has found building material dealers and contractors to be well-informed as to the delivered prices quoted on cement. It finds that purchasers com-
36808 pare the prices quoted by the various cement companies and keep in touch with the various sources of supply. It also finds that it is the practice of contractors to shop around to make sure that they obtain the lowest price quoted in any given market.

In the company's experience it has not found either a dealer or contractor willing to pay more for Kosmos cement than for a competitor's brand.

From the company's experience in selling cement, it has found that it cannot sell cement for more than its competitors and it has also found that it cannot permit any competitor to sell cement in any market at a price less than that quoted by Kosmos, or else Kosmos will be eliminated from that market.

In the event of a decline of price, Kosmos has found that its regular dealer and contractor customers ordinarily give it an opportunity to meet the lower prices quoted by competitors if Kosmos wishes to do so.

In the course of our daily operation, dealers normally telephone in their orders for cement. In calling in such orders there is usually no discussion of price, except at the time of a price change. The dealer is invoiced at the last price we have quoted to him. If that price is higher than that quoted by any other company to that dealer, the dealer usually brings it to our attention and we meet the lower price to retain the dealer's good will.

36809 I have found that dealers report to salesmen immediately information concerning price declines, at which time they usually request to have their recent orders protected and invoiced at the new low price. We have generally followed this procedure on shipments made five days before the decline.

I have also found that in the event of a price advance, the dealers immediately bring that to the attention of our salesmen in an effort to find out whether or not they have

to protect themselves on future shipments of our brands of cement. At the time of calling an increase made by one company to the attention of our salesmen, dealers usually request information as to whether or not we intend to follow along with the price increase. They also request information as to whether or not we will protect them on certain specific jobs which they have sold to contractors or others.

In the event of a change in price Kosmos generally learns of the change in price at all of the important markets where a change was made. All out-of-town telephone calls and telegrams about price changes and placing of orders are generally made with the charges collect.

Method of Analyzing Delivered Prices:

Upon receiving the first information about either a new quotation above or below the market, we advise our salesmen to check all the delivered prices quoted at the various destination points in their territory. Our salesmen check the prices quoted by each of our competitors in an attempt to confirm either the old price or to ascertain what changes have been made at all of the important points where Kosmos cement is consumed, and we always contact the dealers who consume large amounts of our cement. This information is then telephoned and forwarded to the home office where we take the various quotations we have received, and we compare the delivered prices which have been quoted.

During the time that I have been with the Kosmos Company the comparison of the delivered prices has, on several instances, shown that a flat price was quoted at most of the points in some territory such as Hamilton County, or the State of Ohio, and we assumed that this price existed for the entire areas, until we found information to the contrary. At other times the delivered prices appear to form a pattern from some mill, the delivered prices varying in accordance with the amount of the freight rate from that mill to the various destinations. We then carefully check to ascertain whether or not there is a uniform net at this company's mill or silo, and if there is we assume that the competitor intends to limit himself to that net—sometimes called a base or price base or so-called base price—on all of his business.

With that information as to the mill net or base, we attempt to anticipate the delivered prices which that com-

pany will quote at other points, and we assume that
36811 we have met his competition unless we hear to the contrary from our dealers.

With this information as to the delivered prices, we issue quotations either meeting the change or restating our own prices.

Upon issuing quotations to points at which we have no specific information as to what prices are quoted, we have no assurance that our price will meet the prices quoted by the company initiating the price change. As soon as we have issued the quotations, unless we hear to the contrary from our dealers, we are sure that if our quotations were higher than our competitors, our dealers would inform us, and if our quotations were lower than our competitors they would be forced to meet our new low quotations. In addition, if our quotations were lower, our salesman would probably be advised of this fact on his calling upon the trade.

When we broadcast quotations, we send them to all our dealers and prospective dealers, but we do not send them to any of our competitors. We also do not receive quotations mailed direct to us from competitors.

F. Basis Upon Which Kosmos Quotes Its Prices:

It is the usual practice of the Kosmos Portland Cement Company to quote destination prices. This has been the practice as long as I have been connected with the company. It has also been the practice to meet the lowest delivered prices which we found quoted in any mar-
36812 ket in which we wish to sell unless Kosmos' price is lower.

Kosmos has a maximum figure at its mill, to which in quoting its delivered prices, Kosmos adds the package charges and the freight rates. This combination is the lowest delivered price at a number of destinations in the territory around the Kosmos mill. At many other points Kosmos finds lower delivered prices quoted than it would quote, and Kosmos meets such lower prices. At such points Kosmos is merely a price follower. In some instances we have sent out quotations at prices which were not the same as the lowest quoted price in the market, but in general we have met the destination prices as we have found them.

In arriving at its delivered prices for the various destinations where it sells cement Kosmos recognizes that the

market price at many points usually reflects some base or basing point. Kosmos, however, quotes the lowest quoted price at each point where it sells cement regardless of whether or not the delivered price appears to reflect a base.

The Kosmos mill is a so-called base mill. Kosmos is free to make its mill a iron-base mill at any time, or to vary the base figure if it should decide that it was advisable.

G. F.o.b. Mill vs. F.o.b. Destination Prices:

It has been the usual practice of the Kosmos Portland Cement Company to quote and sell its cement for delivery f.o.b. destination. The reason that Kosmos now
36813 follows that practice is that our experience has been that the purchaser is interested in the price at the point where the cement is to be used and is not concerned with a price at our mill. I have always found that the competition we had to meet was at the point of use.

Kosmos quotes delivered prices to enable it to compete with other manufacturers and to enable its dealer and contractor customers to compare its quoted prices with the prices or delivered costs quoted by its competitors.

I recall no requests by dealers or contractors for prices f.o.b. mill. Dealers and contractors request prices f.o.b. destination.

Although in a few instances Kosmos has received requests from departments of the Federal Government for bids f.o.b. mill, the Federal and State governmental departments usually request Kosmos to bid on an f.o.b. destination basis.

Kosmos has no policy against making sales f.o.b. mill and would consider making sales f.o.b. mill to any purchaser under satisfactory circumstances. Kosmos did make a number of f.o.b. mill bids to the State of Indiana and Illinois but no award was made to them on that basis.

H. Quotations of Price By Salesmen:

Kosmos salesmen are now and have been for many years supplied with destination cards containing information concerning delivered prices. In their daily work
36814 they ordinarily have no occasion to use them. Each salesman generally knows the Kosmos price at all destinations in his territory, and he quotes that price to customers there. If he finds competitors' prices different

from those he is quoting at some of these points, he consults the home office.

In the event of a change in price, Kosmos receives information and collects quotations concerning the new announced price or prices, at all of the important destinations at which it sells cement. Our salesmen ordinarily do not have any occasion to compute or calculate delivered prices at the major points of cement consumption within their territories, since information as to the lowest quoted delivered prices become a part of their general information resulting from day-to-day solicitation of the trade.

I. Practice of Bidding to the Government at Regular Commercial Price:

It is the general practice of Kosmos on all Government work, both Federal and State, not to bid lower than its regular commercial price at any particular destination. The reason for this practice, aside from the fact that Kosmos has never felt that the Government is entitled to any lower price than its regular trade, is the fact that it believes that a lower price to the Government would react unfavorably with Kosmos' customers: One of Kosmos'
reasons for not giving a special price to the Govern-
36815 ment on any particular letting, is that Kosmos be-
lieves that its customers would seek similar price considerations. Kosmos respects the views of its dealer and contractor customers because it has to rely on their regular business. Government business is spotty and never results in what can be called "having a customer,"—that is, a regular year-in and year-out customer.

In filling out an invitation to bid to the State or federal agency we look at our destination price file and insert in the bid blank the price which is shown on our price cards.
During the N.R.A. Code period, we bid the lowest price
which we found on file with the Code Authority.
36816 From time to time I have also observed increases
in delivered prices in territory where Kosmos markets cement and I have found that when an increase in prices is announced by one company and followed by other companies that our customers in such markets have usually increased the volume of their purchases. Such purchases are made at the low prices existing before new and increased prices become effective.

We protect our purchasers, both dealers and contractors, who are interested in specific business by entering into

specific job contracts or specific sales orders. These contracts or sales orders protect our purchasers on such business in the event of an increase in price, and I find that we do not receive the benefit of a price increase on such business for a number of months. In the event of a price decline, sales are immediately made at the new low price, and in the event that any substantial amount of ship-
36817 ments are made immediately before the decline, it has been our practice to re-invoice such shipments so that the purchaser got the benefit of the low price.

In the territory in which we normally solicit business, I know of no instance where we have not been aware of an openly quoted change in price, especially a price decline, within a few hours after it had originally been received by the dealer trade.

K. Deviations from published prices:

Kosmos normally sells at its openly quoted price. From time to time, it has found that it was impossible to make sales to a friendly contractor or dealer at Kosmos' openly quoted price. In such cases there had been nothing in its previous relations that would account for his not doing business with Kosmos. Kosmos has then considered making reductions or deviations from its openly quoted price. In some instances Kosmos has made some deviations from its openly quoted price. The reasons for considering such deviations and in some instances making them, has been the fact that Kosmos believed that a competitor had offered to this friendly dealer or contractor a price lower than Kosmos' quoted price or lower than any other openly quoted price.

In jobs involving substantial quantities of cement, in all my cement experience, special prices or terms have frequently been available to the user of large quantities of cement. These prices were at figures less than the
36818 lowest published market prices or at more favorable terms. Kosmos' practice has been to sell at its quoted price in the territory and on occasion the company has met secret prices when this has been necessary to maintain its position in the market.

L. Importance of the dealer in the marketing of cement:

The dealer is Kosmos' most important customer. The percentage of business that Kosmos sells through its dea-

ers is around 80 percent. The importance of the dealer has had a tremendous influence on Kosmos' marketing methods and policies. Kosmos is confronted with a constant necessity for preserving dealer outlets, for fostering the dealer's good will and giving him a price and terms that will enable him to compete with other dealers selling in the same consuming area.

M. Kosmos' concept of a dealer:

Kosmos requires its dealers to be persons to whom
36819 the purchasing public looks in buying cement and other building materials. Kosmos is therefore interested in knowing what stock of building materials a dealer carries on hand and whether or not he has a good credit standing. Kosmos has made it a practice to investigate dealers carefully to see whether or not they are in a position to assist in the marketing of Kosmos cement.

In April, 1935, Kosmos, as a part of its announced policy, included a definition of a cement dealer substantially as it was contained in the N.R.A. Code for the Cement Industry. The application of this definition varies from day to day and it depends upon whether or not Kosmos has adequate dealer representation in a given market and upon the size and needs of each market.

Our concept of a dealer has been in effect since I have been with the company.

N. Business sold direct or sold through dealers:

Kosmos sells through dealers only when sales through established dealer channels seem fair and logical, and where dealers render a service to the ultimate consumer. Kosmos also sells direct to contractors, ready-mix plants, concrete products plants, and to the State and Federal Governments.

Article XI of the N.R.A. Code made no substantial change in the marketing practices of the Kosmos Portland
Cement Company. After Article XI was suspended,
36820 Kosmos continued to sell on substantially the same basis as before.

In February and April, 1935, statements of policy on this subject were issued. These announcements were not the result of any meeting with dealers or dealer organizations, or the result of any meeting with competitors on this subject, or the result of any agreement or understanding with competitors on this subject.

Q. Terms of sale and discount?

From my past experience in the cement industry I have found that the terms of sale and discount quoted by the various companies tended to be uniform. At one time the cash discount was on a percentage basis. Subsequently this became 1 cent a barrel, 2 cents a barrel, 5 cents a barrel, and finally 10 cents a barrel. Each one of these changes resulted in more favorable terms to the customer and in each case as a competitor of the company responsible for the change we were forced to adopt it in order to maintain our position in the trade.

I have always made my terms at least as favorable as any granted by my competitors, because I could not compete as long as I was offering terms which are less advantageous than those offered by other manufacturers. From experience I have found that whenever one of my competitors started giving terms which were more favorable than mine that I had to adopt the change and my reason for not granting more liberal terms myself is that I know from past experience that my competitors
36821 would meet my more liberal terms if I granted them.

F. Broadcasting quotations?

Since around 1913 Kosmos Portland Cement Company has issued quotations to the dealer trade to whom we sell or from whom we solicit business whenever there is a change in price or in terms or conditions of sale. In addition, there have been occasions when we have issued quotations when there has been no change in price. This is done in order to put our name before some of the dealers and amounts to a form of advertising.

In the event of a reduction in price which we decide we will meet at a given destination, we normally authorize our salesmen to meet this reduction prior to a dealer's receipt of our quotation. Under such circumstances we confirm the prices quoted by our salesmen by means of a letter.

Q. Freight rate information?

Salesmen of the Kosmos Portland Cement Company are given copies of The Cement Institute freight rate book. They are also given information concerning the base points and base figures that we determine from prices we have picked up in the field.

We also use The Cement Institute freight rate books in the home office as a source of freight rate information. This information is used in the place of compiling freight information from the official railroad tariffs and is employed because it is a cheap and convenient method
36822 of securing the information.

We employ the freight rate books to determine what the rate will be on shipments moving from our mill. We use the information to assist us in determining whether our mill net would be sufficient to make a given piece of business attractive. We use the information in the event of a change in price to assist us in determining whether or not there is a pattern of prices which figure back to some mill as a base plus the freight charges. In the event of a general change in price level, we also use the information in an effort to anticipate the delivered prices at those points where we have not as yet secured specific information as to what destination prices have been quoted.

R. Statistics:

Up to July 1, 1937, the Kosmos Company received copies of statistical reports sent out by The Cement Institute. This information consisted of a monthly statement of production of clinker and ground cement shipments and stock on hand for the past month. This information was distributed to us by The Cement Institute without any comment. None of this statistical information had any reference whatsoever to price or any elements of price.

I looked over this statistical information to see whether anything contained in it might be of interest to us. Generally speaking, I used it merely as a means of keep-
36823 ing posted on matters of general information. I also received Government reports made by the United States Bureau of Mines which covered substantially the same ground, but which were received at a considerable later time.

36830 By Mr. Withrow:

Q. Mr. Horner, when was the mill, the original mill, of the Kosmos Company built?

A. The building began in 1904, and it went into operation in the latter part of 1905.

Q. Can you tell us what its original capacity was?

36832 A. The original capacity was about 500,000 barrels a year.

By Mr. Withrow:

Q. Was that capacity—that capacity was increased, wasn't it?

A. It was increased in 1913 and '14.

Q. And by what amount?

A. A little more than doubled.

Q. And what were the circumstances surrounding the increase?

36833 A. We thought we could use the additional capacity.

By Mr. Withrow:

Q. Has the capacity been increased by adding new kilns since 1914?

A. It has not.

36834 Q. Have you ever had any agreement or understanding restricting the amount of cement that you 36835 would produce or sell?

A. We have not.

Q. Why was the Kosmos mill located at Kosmosdale, Mr. Horner?

A. It was considered a favorable location with respect to markets and producing conditions.

Q. And the nearest large city is Louisville, is it?

A. Yes.

Q. If you sold all the cement purchased in Louisville, would that take the entire production of your mill?

A. No, it would not.

36841 Q. Now, has Kosmos' market area (I mean the area in which you solicit business—changed since, say, early in the 1920's?

36842 A. Our territory has shrunk somewhat since the early 1920's. Our big shrinkage, however, took place earlier than that.

By Mr. Withrow:

Q. And what were the reasons for this shrinkage in territory, Mr. Horner?

A. The building of new mills closer to the markets.

Q. Was there a time when Kosmos secured considerable business in Tennessee and Mississippi and Louisiana?

36843 A. There was a time when we sold a good deal in New Orleans, Mobile, Birmingham, Pensacola, Jacksonville, Atlanta.

By Mr. Withrow:

Q. Now, in the early 1920's, about how many companies competed that you could find, soliciting business in the same sales area that you solicited business in?

A. Oh, ten or so, I should think.

By Mr. Withrow:

Q. Could you list them?

A. Atlas, Alpha, Missouri Portland, Lehigh, Louisville Cement Company, Universal.

By Mr. Withrow:

36844 Q. How about Marquette?

A. Marquette, Medusa.

Q. Well, about how many companies did you find soliciting business in your more restricted market area by 1930?

36845 A. All of those same companies are still competing in that territory. Some of them with additional mills to those that they had at the earlier dates; and in addition there are new companies. Two of them at Osborn, Ohio, one at—

Trial Examiner Norwood: You need not go into details about that.

By Mr. Withrow:

Q. About how many,—just give us that.

A. About five or six additional companies, I should say.

Q. Making a total, then, of around fifteen or so?

A. Fifteen or sixteen, yes.

Q. Mr. Horner, I show you Respondents' Exhibit 2738, for identification, and ask you if that is the letter which the Kosmos Company received?

A. Why, apparently, we did receive this.

Mr. Withrow: Your Honor, I offer in evidence Respondents' Exhibit 2738 (handing the document to
36846 Mr. Paulson).

Mr. Paulson: This appears to be a letter written by the State Highway Commissioner of the State Highway Department of Ohio on March 3, 1920, that is 20 years ago.

Trial Examiner Norwood: What is the purpose of it?

Mr. Paulson: There has been no foundation laid to show how it is connected with this case, and reading it does not enlighten one in the least.

I object to it as being wholly immaterial and irrelevant. I might consider waiving the objection as to competency if we can find out—

Trial Examiner Norwood: What is its purpose?

Mr. Withrow: I would like very much to show what the circumstances were, from the point of view of the consumer of cement at the time these mills were being built and the capacity of plants was being expanded. I think that letter has a very distinct bearing on the whole problem.

Trial Examiner Norwood: How?

Mr. Withrow: It shows that one purchaser at that time, an important purchaser of cement, was worried about the sources of supply. There was not enough cement available, and he was attempting to get as many sources of supply as possible, and it is proposed to develop through this witness and other witnesses what the situation was during the period from 1920 to 1930, during which time a number of additional mills were built in the State of Ohio and the territory in which this company markets its cement.

Trial Examiner Norwood: Now, how would the fact that in 1920 in some parts of the country there was a shortage of supply of cement? How does that cast a bearing on these issues?

Mr. Withrow: The complaint alleges that the pricing method used by Respondents has encouraged the building of new plants. I would like to show and prove that the building of new plants has resulted from a demand for Portland cement and not as the result of the pricing method in any respect, and the only way I can do that is by showing that there was such a demand.

Trial Examiner Norwood: I am going to sustain the objection, and I will rule out any evidence hereafter offered of that nature.

We haven't time to string this out.

Mr. Brick: Does Your Honor appreciate your ruling while the Government was putting in its case were all just to the contrary, and you permitted them to put in matters relating to that subject?

Trial Examiner Norwood: When you make statements like that, I think it is your duty to cite the record, and I am asking you to cite the record.

Mr. Brick: I will be happy to.

36848 Trial Examiner Norwood: Or retract your statements. You have done that a number of times. I am not going to overlook it any more.

Mr. Brick: I thought Your Honor was sufficiently familiar with the record to note it.

Trial Examiner Norwood: Cite the record.

Proceed.

Mr. Withrow: Do I understand Your Honor's ruling that we are also foreclosed from oral testimony on the subject?

Trial Examiner Norwood: From the subject mentioned in your statement there, that developed there, the subject covered by that, yes.

Mr. Withrow: Well, from Your Honor's statement, I do not know whether you mean that I cannot show the State of Ohio did not have enough cement, or was there—

Trial Examiner Norwood: Make your offer of proof.

Mr. Withrow: I offer to prove through this witness that beginning in 1919, and continuing for a while thereafter, there was a shortage of both coal for the purpose of manufacturing cement and of railroad equipment for the shipment of cement, a natural shortage in the amount of cement which was available to be consumed; that a number of purchasers, including the State Highway Department of Ohio, made inquiries concerning the availability of

36849 Portland cement to carry on projected highway programs and other similar matters, to see whether a sufficient supply was available.

I offer further to show that there was an actual shortage of cement available to be sold and consumed in the territory in which the Kosmos Company marketed cement, and I further offer to show through this witness that it was during this period that a number of mills, new mills, were added, were built, and the capacity of the plants was expanded in that territory.

Trial Examiner Norwood: Counsel has his exception.

36850 By Mr. Withrow:

Q. Mr. Horner, have you been able to sell all of the cement that you could produce or wanted to sell in the territory where you had an advantageous freight rate?

A. No, we would not be able to.

Q. And what effect has this had on your sales territory?

A. It forces us to go into territories where our freight rate is not as good as some others.

Q. Now, who determines the marketing area of your company?

A. Well, there is not any rigid marketing area laid down. We determine it by the net return we can get at our mill, and by how much we need business at the moment.

Q. Is that under your supervision, your general supervision?

A. My general supervision, yes.

Q. Commission's Exhibit 1063-A to D, Mr. Horner, indicates that you were mailed a copy of an invitation to bid at Rolling Fork, Miss., and the testimony is that you did not bid on that invitation. Would you tell us what your reasons are for not answering an inquiry such as that down at Rolling Fork, Miss.?

A. So far as I know, I never personally saw it, but I have made inquiries in the office, and the best recollection I can get is—not recollection, but the best way they can account for it is that they took a look at their des-
36851 tination and considered it of no further interest, and probably threw the invitation away.

Q. Does it happen from time to time, Mr. Horner, that you receive requests for sales of cement at points quite distant from the Kosmos Sales territory?

A. Yes, quite often we get requests that we could not possibly think of filling.

Q. And what is your procedure when you receive such requests?

A. Well, if it is a public invitation like that it requires no acknowledgment at all; we simply don't bid. If it is a request from some private party in the form of a letter, we usually answer it, just as a matter of courtesy.

Q. In the stipulated testimony, Mr. Horner, the phrase "mill net" is used a number of times. Will you tell us what you mean by the term "mill net"? What does that mean?

A. I mean the price at destination minus the freight and the package. I still leave the cash discount in
36852 because at the time we ship we do not know whether the cash discount will be taken or not.

Q. Do you, in the operation of your business, consider this mill net to be your price?

A. No. That is the net return that we get.

Q. Is your sales expense, Mr. Horner, greater on some jobs and some territories than in others?

A. Yes, I am sure it is.

Q. What is the distance from your mill to Louisville?

A. It is about 18 miles.

Q. Is there another company located near Louisville?

A. There is.

Q. What is that?

A. The Louisville Cement Company has a mill at Speeds, Ind., about 11 miles from Louisville.

Q. Mr. Horner, during your experience with the Kosmos Company, have there been any reductions in prices?

A. Yes, there have.

Q. And in the case of such reductions, say, taking Louisville, for example, has that affected the number of companies soliciting business in Louisville?

A. It does not affect the number of companies that regularly solicit, no. It might possibly crowd out some very distant mills who have made occasional shipments there.

Trial Examiner Norwood: That would reduce the 36852 number, wouldn't it?

The Witness: If a mill were crowded out; yes, sir; it would reduce the number.

By Mr. Withrow:

Q. Will you tell us what your experience has been when one company announces a decline in price, as to what the other companies do, whether they meet it, or whether they do not?

A. Normally, the other companies meet it immediately.

Q. Well, have any of your competitors reduced the price in the Louisville market?

A. Yes. It has happened.

36857 Q. Mr. Horner, has there been, in your experience, an occasion where a company initiating a decline in price at Louisville has taken away from you a friendly customer-dealer in the Louisville market immediately upon the announcement of the decline in price?

A. I cannot remember any such occurrence.

36858 Q. Now, a few minutes ago you said that possibly some company with a small amount of marginal

business might have been driven out in the past. Would you give us just some idea about what you meant by "marginal business," the amount, the quantity?

A. If I may explain, Your Honor, the situation falls into two parts: We were driven out of the Far South because new mills were built much closer to those markets, and we saw it was hopeless to try to continue to compete there.

Now, if a price is reduced at a place that we regard as within our regular territory, such, for instance, as Lexington, Ky., which is about a hundred miles away, we would not be driven out from there by any price reduction, because if we stop selling cement in Lexington, we might just as well go out of business altogether.

36859 Q. Would you tell us, Mr. Horner, what the practice is of the Kosmos Company on finding lower delivered prices quoted at the markets where it sells in its territory?

36860 A. We normally meet them.

Q. Has Kosmos ever found itself able to sell at the old and higher prices?

A. No, we can't.

Q. Do you have salesmen in all the territories that you described in the stipulation as your normal marketing area?

A. We do.

Q. What is their function?

36861 A. To keep in contact with the trade, try to make sales, and keep us informed as to the market.

Q. How many salesmen do you have today?

A. We have eight, I think.

Q. And have you put on any new salesmen recently, any additional salesmen?

A. Our force has been increased over the last few years, yes.

Q. And can you tell us your reasons for increasing the sales force?

A. Well, in an effort to hold our business or get more business.

Q. Has there been, Mr. Horner, a decline in the volume of your sales, say, from the year 1930 to '37?

A. Yes. We shipped less in '37 than '30.

Q. Has this drop in sales volume affected your selling cost?

A. Yes. The selling cost is pretty directly proportionate to volume.

Q. And would you tell us whether or not you observed that any of your competitors increased their sales forces?

A. I think they have, a good many of them.

36866 Mr. Wooden: I conceded it once this afternoon, and I will do it again, that every increase in capacity of every particular mill, or the building of a new mill, came about because the promoters or the owners of the mill thought there was a chance of disposing of their output.

Mr. Paulson: That is what we said all the time

36876 Washington, D. C.,
April 18, 1940.

36877 CHARLES HORNER thereupon resumed the stand and testified further as follows:

Direct Examination by Mr. Withrow (Continued).

Q. Mr. Horner, would you just briefly describe to us for the record the pricing practices of the Kosmos Company around 1908 and 1909, when you first were associated with the company?

A. We always sought to determine what the going price was at destination.

36878 A. (Continuing.) And meet them.

Q. Did you secure any information about the freight rates from competing mills at that time?

A. We used to carry a complete list of tariffs giving us the rates from our own mill and also from the nearby competing mills.

Q. Would you tell us how your method of quoting prices back in 1908 compared with the present method?

A. Essentially it was the same.

Q. In those early days did Kosmos sell through any distributors?

A. In the very early days we did in the Far South; not in the territory that we are restricted to now.

36879 Q. Would you tell us on what basis those distributors bought, did they buy on a delivered price or f.o.b. mill?

A. Those distributors had their own traffic man and they bought at the mill, to the best of my recollection, and we did not know where the cement was going except that it was not to go into the territory that we were working ourselves.

Q. And at that time did you sell any other customers on an f.o.b. mill basis?

A. Not that I can recollect.

Q. Do you recall requests at that time to buy on an f.o.b. mill basis?

A. I do not recall any.

Q. And would you tell us why you made it a usual practice at that time to sell on a delivered price basis?

A. That is the way our customers wanted it quoted.

36887 Q. Mr. Horner, would you tell us if you know if most of your customers are equipped to figure freight rates?

A. I do not think they are.

Q. What type—

Trial Examiner Norwood: Now, I am going to instruct the Counsel to discontinue asking questions on that subject. It is covered here and you are going into unnecessary particulars and details.

Mr. Withrow: I am either going to make an offer of proof or ask the questions, Your Honor. I do not care which. I thought the offer of proof was the shortest way, and that is the reason I attempted to make it.

Trial Examiner Norwood: I am going to ask the Counsel not to ask any further questions along this line.

Mr. Withrow: If that is an instruction—

Trial Examiner Norwood: That is a ruling which the Counsel will have to regard if he expects to continue in this case.

Mr. Withrow: And I also understand that you rule that I cannot make an offer of proof.

Trial Examiner Norwood: Yes.

Mr. Withrow: Note an exception.

Trial Examiner Norwood: Yes.

36888 By Mr. Withrow:

Q. Mr. Horner, I show you Respondents' Exhibits 2739, 2741, 2742, and 2747, and ask you if those are requests received by the Kosmos Company in the regular course of business?

A. Yes, they are.

Q. And would you look at the rest of these Respondents' Exhibits 2740, 2743, 2744, 2745-A and B, and 2746, and tell me if these are letters and inter-office memoranda written by the Kosmos Company in the regular course of business in answer or in handling such inquiries?

A. Yes. These are answers of ours to such inquiries.

Q. And are those papers there typical of such requests in the manner in which they are handled?

A. They seem to me to be, yes.

Mr. Withrow: We can save some time if the documents are received and not have to have oral testimony.

I offer Respondents' Exhibits 2739, 2740, 2741-A, B, 2742, 2743, 2744, 2745-A, B, 2746, and 2747 (handing the documents to Mr. MacIntyre).

Mr. MacIntyre: If Your Honor please, we ob-
36889 ject to the pending offer as relating only to immaterial matters.

Trial Examiner Norwood: What is it?

Mr. MacIntyre (handing the exhibits to the Trial Examiner): They merely show that a few customers of this company asked for quotation prices f.o.b job sites and certain delivered points.

We have stipulated and we stipulate again as to the ultimate facts, that each Respondent can produce a number of requests from a number of customers showing that such customers asked for quotations of prices at delivered points and at job sites.

Mr. Withrow: Your Honor, they are not being offered for that purpose, so consequently on that I thought Your Honor might like to know before you rule, Counsel for the Commission's economists testified that in their opinion prices included not only the figures but the services and matter—all the services and matter rendered to the customer which makes it rather difficult for the Commission to maintain its position that we have had identical prices because of different services rendered different customers, and I want to put in the record as rapidly as possible and with as little oral testimony the types of these services, what is done and how it is handled, and how it varies with different customers on different inquiries; and
that is the sole purpose of the offer. It is not to
36890 show that customers asked delivered prices because
I am glad we finally got the Commission—

Trial Examiner Norwood: I think it has been stipulated and admitted that these special services are rendered to customers and different kinds of services are rendered to customers by all companies.

I think the Commission will take judicial notice of it. Anyway, there is abundant evidence in the record on it, and the objection is sustained; and I shall ask Counsel not to have any more papers like that marked, to take the time here to mark those papers.

I have made rulings on that. Counsel has the advantage of many exceptions on it, and it will serve no good purpose to continue to offer papers of that character, or papers to show that dealers desire delivered prices, papers to show that dealers approve of Respondents' policy, card indexes to show that the Respondents have some system of recording their prices.

Now, I am making the ruling that Respondents may not take up the time of this hearing by having such papers as that marked in the future and to that ruling I want the Respondents to have their exceptions.

Mr. Withrow: Not only an exception, Your Honor, but I wonder perhaps if we cannot cover this situation more to the satisfaction of the Respondents, if it can be 36891 understood for all Respondents, that Your Honor would rule the same with reference to similar proffers on behalf of all Respondents, so that we are in the position of having held ourselves forth as being able to produce such evidence, but that Your Honor has ruled it out; otherwise, the record is in doubt as to whether or not such evidence does exist.

Trial Examiner Norwood: That goes with respect to all Respondents whose evidence is to be produced hereafter; as to those from whom we have already heard, why, their matters are taken care of on the record.

Mr. Withrow: Well, I think that will save some time.

By Mr. Withrow:

Q. Mr. Horner, I will show you Commission's Exhibit 2191-A and B, and I believe you have already testified that you prepared that; is that correct?

A. Yes, that is right.

Q. Would you look at the document and tell us whether or not you are still of the same opinion as expressed in that document?

A. I have looked this document over previously and I am still of the same opinion.

(Mr. MacIntyre examines document referred to.)

Q. Was that letter prepared as the result of any agreement to sell only on delivered prices, Mr. Horner?

36892 A. No.

Q. And there was some attempt by the Commission to prove that that letter was inspired or dictated by someone other than yourself; is that correct?

A. That statement is the result of my own ideas.

Q. I show you Commission's Exhibits 571-5-C and 5-D, and ask you if you are familiar with that letter?

A. Yes. I have re-read this since this case came up.

Q. And is that still your opinion on the matters expressed?

A. Yes, it is.

Q. And was that letter the result of any agreement which you had to sell on delivered prices?

A. No, it was not.

Q. And there is some inference they tried to draw that that was dictated by somebody else and was not your opinion; is that correct?

A. No, this letter is the result of my own ideas.

36895 Q. What is the current base figure that you recall, Mr. Horner, at your mill?

A. $1.75 net; that is subject to cash discount.

Q. And who determined this figure of $1.75?

A. Well, I suppose I did in conference with my associates.

Q. Well, is that the figure—is that figure the result of any agreement with any of your competitors that it should be $1.75?

A. No, it is not.

Q. Would you tell us what your reasons are for having a figure of $1.75?

A. I hardly know how to answer that. We think that is about the right figure to use.

36896 Q. Now, in the stipulation there is a statement that you endeavored to meet the lowest prices quoted by any of your competitors at a given time. Will you tell us your reasons for not quoting a price below the figure that your competitors quote?

A. Well, if we do we may possibly have a very temporary advantage, but it will be very temporary, and the chances are it may react upon our whole net return.

Q. Now, Mr. Horner, has there been any instance that you can recall, or have there been occasions where one of your competitors issued quotations increasing their destination prices and you did not follow along?

A. Yes, there have been.

Q. Do you recall any specifically?

A. I am hazy on it. I think there was an attempted advance by Lone Star to a number of destinations in our territory some years ago; I cannot say how many.

Q. Well, prior to—

A. Which we did not follow.

Q. Prior to July 1, 1957.

A. Yes, earlier than that.

Q. Now, is there any company in the territory where you market which you consider to be the price leader, which determines the prices?

A. No.

36897 Q. Well, what has been your experience, is it generally any one company that takes the initiative on changing prices, or does it vary?

A. I think it varies. I do not know of any one company that could be called that.

Q. Now, has The Cement Institute ever attempted to prevent you from exerting price leadership?

A. No, The Cement Institute has never attempted to tell us what prices to make.

Q. Have you, Mr. Horner, or your company, looked to the Institute as a formulator of prices, pricing and marketing policies?

A. No. They compiled what you might call the going customs in the trade at the time of the Code.

Q. Well, did you agree to follow those customs or make any special use of that Compendium?

A. We subscribed to the Code while it was in effect.

Q. That is the N.R.A. Code?

A. Yes.

Q. Now, Mr. Horner, have you ever had any understanding or agreement with any competitors of yours with respect to what prices you should quote or charge for cement?

A. We have not.

Q. Mr. Horner, I show you Commission's Exhibit 3211-A to C, and ask you if you recall that letter?

36898 A. I had forgotten it completely until it came up in this case. I recall it now.

Q. Would you just explain to us briefly on the record what your idea was in writing that letter?

A. Well, at the time I wrote this letter I was under the impression that the Clayton Act was intended to do away with favoritism in commercial prices just as the Hepburn Act had done away with railroad rebates.

Q. To your recollection, did you ever receive an answer to this letter?

A. I have no recollection of receiving any answer of any kind, and I have not been able to find any evidence of an answer.

Q. Have you made a search in your office?

A. Yes.

Q. Do you recall ever having any conference with Mr. Speed about the matters referred to there?

A. No, I do not recall having any.

Q. Do you recall whether or not you made any changes in your prices as the result of that letter?

A. I do not think we did. I think the letter was of no effect whatever of any kind.

Q. Did you find from the field that the Louisville Company made any changes?

A. No, I think they kept on with their same practices.

36899 Q. Mr. Horner, are you a party to any agreement as to which mills shall be base mills and which mills shall be non-base mills?

A. No, we are not.

Q. Would you tell us how you determine for the Kosmos Company whether or not some competing mill is a base mill or nonbase mill?

A. That is done by checking back prices found in the field.

Q. Now, in the case of a reduction in price, when does that become effective, Mr. Horner?

A. Immediately, just as soon as we find it out.

Q. And how about in the case of an advance in price?

A. It has been customary for a long time to allow buyers to protect themselves for a few days before making the advance effective.

Q. And is that period that you refer to, is that adopted as the result of any agreement with any of your competitors?

A. It was put in the Code, a definite five-day period, but prior to that I think practically all companies had done

something of the kind, but had decided each case on its own merits.

Q. Am I correct in understanding, then, that the
36900 Kosmos Company gave different periods of time before the Code?

A. That is true, according to the merits of each case.

36921 Q. Mr. Horner, does Kosmos issue period quotations to the trade?

A. We do occasionally.

Q. And are there any specific occasions when you broadcast quotations to the trade?

A. We broadcast quotations if we change our prices. Occasionally we broadcast them in the form of advertising.

Q. Now, what has been Kosmos' practice about dating quotations they issue? Do they date them the date they mail them, or do they pre-date them?

A. I believe we date them the date we mail them, probably preparing them a day or two in advance on account of the limitations of the office force.

Q. Now, do you mail copies of any of these quotations direct to your competitors?

A. We do not.

Q. Do you keep copies of these quotations?

36922 A. Only the records on the cards for each destination.

36923 Q. Mr. Horner, is a copy of this card for each destination sent to your salesmen?

36924 A. Yes.

Q. And would you tell us whether or not it has been the practice of the company to post on such cards as this the delivery price quoted on each time you broadcast quotations?

A. Yes, it is.

Q. Do you prepare, or does the Kosmos Company prepare in its own office lists of so-called price bases that it finds in its territory?

A. I believe we do.

Q. Do you receive copies of these lists of price bases from competitors?

A. No, we do not.

Q. To whom do you distribute copies of this list of price bases made up in your office?

A. I am not sure whether we send the complete list to

our salesmen or not. We do notify each salesman of the bases that would effect the territory in which he is selling.

Q. Do you distribute copies or send the information to any of your customers?

A. No, we do not.

Q. Do you mail them or give them to any of your competitors?

A. No.

Q. Mr. Horner, is the United States Government a large purchaser of cement from Kosmos?

A. Normally they are not.

36927 Q. Has the Kosmos Company found the business of selling direct to the United States Government at all burdensome to the company?

36932 By Mr. Withrow:

Q. Mr. Horner, in recent years, have you ever quoted cement on an f.o.b. mill basis?

A. We have at times.

Q. I show you Commission's Exhibit 129, and ask you if you recall the occasion of those bids.

A. Yes, I recall this.

Q. That is for cement to be used in Boulder Canyon, is it not?

A. Yes.

Q. Now, would you tell us the circumstances under which you made a bid at such a distant point?

A. At that time the Bureau of Standards was testing a number of cements in the course of determining what cement, what composition of cement, I should say, would be best adapted to use in the Boulder Dam.

They found that our normal cement was closer to
36933 the desired composition than any of the other normal cements they tested.

When requests for prices were made we put in a price thinking that we might get a few carloads of business out of it before the nearer mills equipped themselves to make the kind of cement wanted.

Q. Do you recall, Mr Horner, whether you bid an f.o.b. mill price in this instance?

A. We did. We knew there was no chance to be as low at destination as the nearer mills. We bid what we wanted for the cement at our mill, and let the Government decide whether they cared to pay the freight or not.

Q. And did you receive an award?

A. We did not, no.

36935 Q. Mr. Horner, do you recall the so-called Good Friday invitations?

A. Yes, I do.

The witness identified Resp. Ex. 2758 as seeming to be a copy of the bid Kosmos made at that time in response to the Good Friday invitation.

Q. And did you in that instance bid an f.o.b. mill price?

A. We did.

36936 (RESP. EX. 2758-A, 2758-B, 2758-U, and 2758-Z-7, was offered and received in evidence.)

By Mr. Withrow:

Q. Would you tell us your reasons, Mr. Horner, for bidding on the Good Friday request?

A. Well, we considered it a very impractical form of bid, but we did bid because we thought the Government should receive a bid if they asked for it. We protected ourselves in the bid so that we would not be much hurt by the indefinite character of the obligation that the Government proposed to assume.

Q. Did you receive an award?

A. We did not.

36937 The witness identified Resp. Ex. 2759 as advice from the Procurement Division that all of the bids have been rejected. He does not know of any other communications that Kosmos received from the Procurement Division about the rejection of those bids.

(RESP. EX. 2759 was offered and received in evidence.)

36938 The witness identified Resp. Ex. 2760-A and B, Resp. Ex. 2761, Resp. Ex. 2763, as appearing to be communications received by the Kosmos Company. These individuals are customers of the Kosmos Company, people from whom it solicits business. He further identified Resp. Ex. 2764 A and B as the type of circular that was attached. He can tell from the initials on that exhibit that it is the writing of C. C. Young, a Kosmos salesman. Mr. Clark is associated with his company. He further identified Resp. Ex. 2762 as his reply to Resp. Ex. 2761.

36940 (RESP. EX. 2760-A, 2760-B, 2761-A, 2761-B, 2762, 2763, 2764-A, and 2764-B were offered and received in evidence.)

36941 Q. Now, do you recall, Mr. Horner, a request several months later by the Procurement Division for f.o.b. mill bids in Ohio and West Virginia?

A. Some time later there was such a request; yes.

Q. And did you bid on this inquiry?

A. We did not bid on that one.

Q. And would you tell us your reasons for not bidding?

A. Well, in view of the first experience we did not think there was much chance of our getting any business out of it, and our first action had subjected us to some unfavorable opinion from some of our dealers. We
36942 thought it was to our advantage not to bid the second time.

Q. Now, have you ever sold on an f.o.b. mill basis to the Federal Government at destinations located near your mill?

A. We have, yes.

Q. And do you have any particular point in mind where the cement was so used?

A. Fort Knox is the point I have in mind.

Trial Examiner Norwood: When was that?

The Witness: We do it frequently. I cannot fix any exact date on it.

By Mr. Withrow:

Q. Have there been any occasions where you bid f.o.b. mill to Fort Knox subsequent to the Good Friday bids?

A. I believe so, although I am not entirely certain about it.

Q. Do you recall at this time, Mr. Horner, when the invitations for bids f.o.b. mill started to come from Fort Knox, whether that was before or after July 1, 1937?

A. I cannot say.

Q. Unless Counsel for the Commission insists, I won't have these invitations marked, but I will ask you to look at these and see if you can refresh your recollection about when the Federal Government started asking for f.o.b. mill bids at Fort Knox?

36943 Mr. Withrow: Well, I think maybe the Commission and the courts might be quite interested to know that this great desire the Federal Government has shown for f.o.b. mill bids is a desire which originated subsequent to the issuance of the complaint in so far as the invitations for bids show what the desire was; and I propose to show through this and other witnesses that on re-

quests for f.o.b. mill bids, the Kosmos Company, for instance, bid f.o.b. mill bid to Fort Knox when they started asking for f.o.b. mill bids. Of course, prior to that they did not bid f.o.b. mill because it was not even asked.

36945 Trial Examiner Norwood: Answer that question. Do they?

A. Yes, they refresh my memory.

Trial Examiner Norwood: Go ahead.

By Mr. Withrow:

Q. Well, what do you find, in what form did they request bids?

A. I find an invitation dated July 27, 1935, which contains this provision: "All quotations must be f.o.b. destination Fort Knox, Ky., otherwise no consideration can be given to bid." The same provision is in an invitation dated December 5, 1936, and the same provision in an invitation dated January 14, 1937.

In an invitation dated December 11, 1937, there is this provision: "All supplies shall be delivered f.o.b. destination, Fort Knox, Ky., unless otherwise specified in the schedule of deliveries. Where bids are made f.o.b. shippers' point, the bidder will give the shipping weight of the item bid on in order that the Government may figure cost of shipping."

36946 Mr. MacIntyre: Your Honor please, in the light of the showing of Commission's Exhibits 6-A and B, and 7-A, and B, and the testimony of the witness Barton Murray, to the effect that the President of the United States plead with this industry to give f.o.b. mill price quotations to the Federal Government in 1934, and that they steadfastly refused to do so, and with that showing with the evidence just entered into the record, that does not meet any issue that is involved here, I move to strike that that has just been received.

Trial Examiner Norwood: Now, the fact that evidence is in the record which you think very strongly controverts that, or disproves it entirely, would not justify this bit of evidence going in for consideration.

Mr. MacIntyre: It makes this immaterial; it does not meet any issue. It was offered for the purpose of showing the Government did not ask for f.o.b. mill bids until afterwards, and if it does not show that, there is nothing to show that, it is immaterial for any purpose.

Trial Examiner Norwood: It is showing there that the Government did ask for destination price bids prior to that time.

Mr. MacIntyre: In some instances they did, and we have never disputed it.

Trial Examiner Norwood: I think that that is all
36947 very clear on the record, and I think that Counsel in his questions could possibly be getting after some more important.

Inasmuch as it has come up, I shall overrule the objection and deny the motion to strike.

Mr. Brick: It seemed to be pretty important, Your Honor please, from all of the excitement we heard from the other side of the room.

Trial Examiner Norwood: Well, in view of the statement of counsel I think we had better let this in.

Mr. MacIntyre: It is important to us because it is taking up time unnecessarily in this case.

Mr. Brick: Let us eliminate the argument.

Trial Examiner Norwood: All right.

Proceed.

By Mr. Withrow:

Q. Mr. Horner, in this invitation, dated December 11, 1937, which you referred to, do you recall whether you bid f.o.b. your mill on that invitation?

A. I cannot say unless the record shows it.

Q. Well, would you refresh your recollection as to whether or not you bid f.o.b. mill?

A. Yes, we did.

Q. And did you also bid f.o.b. destination?

A. And also bid f.o.b. destination.

36948 Q. Mr. Horner, I show you Commission's Exhibit 179, and ask you if you are familiar in a general way with that Presidential order?

A. Yes, in a general way I am.

Q. Did you ever submit a bid using that order as a means in deviating from your prices filed with the Code Authority?

A. I do not think we did.

Q. And would you tell us your reason for not doing that?

A. Well, we did not think the Government was entitled to any better price than other purchasers.

36949 The witness identified Resp. Ex. 2765 A to I as a request from the United States Engineers for small quantities of cement at several dams of the Ohio River. That is a copy of the bid which Kosmos submitted.

36950 Mr. Withrow: I would like to show what this company bid, and what the conditions were that the Government specified which this bid answered. Now, all we have in the record is a document like this Commission's Exhibit 277-2-F.

(RESP. EX. 2765-A to 2765-I was offered and received in evidence.)

36951 By Mr. Withrow:

Q. Mr. Horner, would you tell us what the procedure of the Kosmos Company was at the time of the issuance of the complaint, July, 1937, with reference to who paid the freight and who tendered the payment of freight to the railroad?

A. Ordinarily, the buyer paid the freight for our account and deducted it from our invoice.

Q. And do you know how long that practice had been been followed by the Kosmos Company?

A. Ever since I can remember; I think since the beginning of the company, probably.

Q. In the event of any damage in transit, who takes the matter up with the railroad, Mr. Horner?

36952 A. As a matter of practice, I do not remember exactly what is in the fine print there, but as a matter of practice we make good the delivery of the goods at destination both as to price and as to condition.

36953 Q. Have you had any problems with respect to diversion of cement in transit, Mr. Horner?

A. Of late years I cannot recall any, or I have not been told of any.

Q. Has Kosmos ever entered into an agreement to prevent purchasers from diverting shipments in transit?

A. No, we have not.

Q. Do you have a stamp on your bills of lading with a statement showing that diversions will not be permitted?

A. Yes, we have.

Q. I show you Commission's Exhibit 584-G, and ask you if you recall how long after receiving that letter you began stamping bills of lading?

A. I have looked up that date, and I find that it was in the latter part of 1936.

Q. That would make it almost a year?

A. Something like that, yes.

Q. Did you ever enter into an agreement with any of your competitors to put such a stamp on your bill of lading?

A. No. Diverson has not been any problem with us. We happened to come across that stamp and thought it might be a good thing to put it on our bills of lading just in case the problem should arise.

36954 Q. Mr. Horner, do you permit trucking from your mill at the present time?

A. On special occasions.

Q. Do you have any demand for trucking from your mill other than these special circumstances?

A. Well, there are some people running trucks into Louisville who would like to pick up loads of cement on their way back, but none of our regular dealers request it.

Q. Would you tell us briefly what these special circumstances are?

A. A road job right close to the mill, something of that nature.

Q. Now, have you ever permitted, other than these special instances, customers to come to the mill and take truck delivery at your mill?

A. At one time for a short period we permitted truckers who were running back from Louisville past our mill to pick up cement, but it immediately got us into trouble with our regular dealers and we had to stop it.

36955 Q. And could you fix the time, approximately?

A. No. I remember the occurrence. I cannot fix the time. Five or six years ago, I should say.

Q. Well, do you know about how much tonnage was taken for truck delivery while this condition existed?

A. Oh, it did not amount to much. Just enough to disturb our dealers who were affected by it.

Q. Now, was your mill constructed so that it could efficiently load and handle a great number of trucks?

A. No. It is not equipped to take care of any considerable number of trucks.

36956 Mr. MacIntyre: We object to the offer as incompetent, irrelevant, and immaterial for so many reasons we do not want to take the time to state them (handing the document to the Trial Examiner).

36957 Trial Examiner Norwood: I think I will sustain the objection to it.

By Mr. Withrow:

Q. Now, Mr. Horner, did you ever attend any meetings at which you agreed with dealer associations to discontinue trucking?

A. No, we did not.

Q. Did you enter into any such agreement with dealer associations?

A. We did not.

Q. Did you enter into any agreement with your competitors—that is, to discontinue trucking?

A. We did not.

Q. Did the Kosmos Company ever have in effect a special 13-cent charge for loading cement on trucks?

A. No, we did not.

36959 Q. Now, is your mill so situated that water transportation is available as a method of distributing your cement?

A. It is available as a method of distributing part of our cement.

Q. And does Kosmos employ water transportation in distributing its cement?

A. We do.

Q. And how do you handle this matter of water shipments?

A. We do it all ourselves, through a subsidiary, I should say.

Q. And how long has Kosmos shipped on the Ohio River there, roughly?

A. About 15 years.

36960 Q. And about what percentage of the shipments that you make are made by water, in part?

A. I haven't looked up. I think it runs normally 15 to 20 percent.

Q. And to what destinations do you normally ship by barge?

A. Our regular destinations are Cincinnati and Evansville.

Q. Are these two of your principal markets?

A. Yes.

Q. Do you have any demand to ship by barges from purchasers located in Louisville?

A. No, Louisville is too close for barge delivery to be practical.

36961 By Mr. Withrow:

Q. In the stipulation, Mr. Horner, there is a reference to Kosmos' concept of the dealer: In Kosmos applying its idea of a dealer are there any persons who represent themselves to be dealers who buy cement from other manufacturers but to whom you do not sell cement?

A. There are such cases.

Trial Examiner Norwood: Is that because you do not regard them as dealers?

The Witness: Usually because we do not think they are qualified to perform dealers' duties.

By Mr. Withrow:

Q. Do you have any agreement with your competitors as to what companies are dealers and what companies are not dealers?

A. No, we have not. We determine that for ourselves.

Q. Do you have any agreements with dealers' associations on that question?

A. We have not.

Q. And in determining whether or not some company is a dealer, do you take into consideration the fact that he is a member of a dealers' association?

A. We would not know whether he was or not except by accident.

Q. Did you ever refuse to sell to a dealer because a building supply dealers' association requested you not to sell?

A. I feel sure we have not.

36962 Q. Now, what part, if any, do your salesmen take in determining whether or not some company should be sold as a dealer by the Kosmos Company?

A. Well, the salesman's report on a dealer or a proposed dealer naturally has a good deal to do with our decision. We may check that report if we see fit.

Q. Does the interpretation and application of your concept of a dealer vary at different points in your territory?

A. Yes, it does. The larger the city or town the more we would expect a dealer to confine himself just to building supplies. When you get into a very small place a dealer may also be a hardware merchant, or a lumber yard, or something of that nature.

Q. Would you tell us whether or not you find, Mr. Horner, that the dealers whose business you solicit are solicited and quoted by a number of your competitors?

A. That is usually the case; always, in fact, I think.

Q. Now, do you, from time to time, receive suggestions or criticisms from building supply dealers' associations on matters of your sales policy and things of that character?

A. Why, I suppose we receive protests once in a while if we have done something that they think is con-
36963 trary to their interests.

Q. Well, could you tell us what the normal procedure is, the usual procedure of the Kosmos Company with respect to such protests?

A. If it is a customer of ours, why, we discuss the matter with him. If it is a protest from some dealer's organization we usually do not; in fact, we never reply.

Q. Now, do you sell to a dealer in one town—~~located~~ in one town—and allow him to take delivery in a town where he has no warehouse facilities?

A. No. We only sell a dealer for delivery at the town where he is equipped to do a dealer's business.

Q. Would you tell us what your reasons are for that practice?

A. Well, unless he is equipped to do a dealer's business in a town he cannot represent us properly.

The witness identified Resp. Ex. 2767 as a copy of a policy Kosmos put out dated February 23, 1935; Resp. Ex. 2768 as a subsequent revision of that policy dated April 13, 1935. These are the two policies of the company in February and April, referred to in the stipulation under business sold direct or sold through dealers.

36964 Q. Now, what were the circumstances existing in the territory where you market cement, Mr. Horner, at the time you issued the policy in February, 1935, if you can recall?

A. There was a good deal of uncertainty. Article XI of the Code was under suspension and the dealers wanted to know what was what. Apparently other companies were under the same pressure from their dealers, and one or more of them got out a statement of policy. We picked up one of those statements and thought it would be a good thing for us to do, and I think we imitated it substantially.

Q. Now, can you tell us whether or not after some of the other companies issued these policies dealers brought this to your attention also?

A. We got them. I do not know whether through dealers or whether our own salesmen picked them up.

Q. And would you look at that policy in February, 1935, and tell us whether or not that announcement
36965 involved any substantial departure from your previous practices?

A. I can say from memory that it did not.

Q. Now, would you tell us what were the circumstances existing in the territory where you market cement at the time you issued that policy in April, 1935?

A. Well, some of the other companies made revisions in their previous announcements of policy, and we imitated them. I cannot say that we used exactly the same language, but in substance we gave the dealers the same policy that they did.

Q. And in this case, too, where did you secure the information as to what the policies were announced by other companies?

A. Either by some dealers or by some of our salesmen; I cannot say.

Q. And when you say from salesmen, you mean from salesmen picking them up in the field?

A. That is right.

(RESP. EX. 2767 and 2768 were offered and received in evidence.)

36972 The witness identified Resp. Ex. 2769-A and B as a Kosmos quotation to a dealer dated February, 1931. The stamp on it indicates that it was issued about the time that Kosmos discontinued the dealer discount.

36973 (RESP. EX. 2769-A and 2769-B was offered and received in evidence.)

By Mr. Withrow:

Q. Did you discontinue the dealer discount, Mr. Horner, as the result of any agreement with any of your competitors?

A. No; we did not.

36974 Q. Has Kosmos Company ever granted a quantity discount?

A. No; we have not.

Q. Will you tell us your reasons for not granting one?

A. I think it is impractical to fix the various steps of a quantity discount.

Q. Is the Kosmos Company a member of The Cement Institute?

A. Not now.

Q. It was a member at one time?

A. It was; yes.

Q. Do you know when it became a member?

A. I find that we joined in June, 1933.

Mr. Withrow: Will you mark these two documents?

(The documents were marked for identification "Respondents' Exhibits 2770 and 2271.")

By Mr. Withrow:

Q. I show you Respondents' Exhibit 2770, for identification, and ask you if that is your application for membership in The Cement Institute (handing the document to the witness)?

A. It appears to be a copy of our application.

Q. And is Respondents' Exhibit 2771, for identification, the letter accepting your application (handing the document to the witness)?

Mr. Withrow: Your Honor, I offer in evidence Respondents' Exhibits 2770 and 2771 (handing the documents to Counsel for the Commission).

36975 (RESP. EXS. 2770 and 2771 were offered and received in evidence.)

By Mr. Withrow:

Q. Will you tell us briefly why you joined the Institute?

Trial Examiner Norwood: I think he has already told us that.

Mr. Withrow: Well, if Your Honor is satisfied with that, that is all right.

By Mr. Withrow:

36976 Q. Will you tell us, Mr. Horner, when you resigned from The Cement Institute?

A. To the best of my recollection, it was in November, 1937.

Q. That was prior to any hearings in this case?

A. I suppose it was.

Q. Now, has any person connected with the Kosmos Company ever been an officer of The Cement Institute?

A. I think not.

Q. Has anyone ever been a director or trustee of the Institute?

A. I think not.

Q. Have you ever been a member of an Institute committee?

A. I think not.

Q. Did you ever attend any Institute meetings?

A. I attended meetings of the Code Authority, and I suppose of the Institute, too. The two were pretty much the same thing.

Q. Now, was there any agreement on price or sales policy entered into at any of those Institute meetings that you attended?

A. Not that I know of.

Q. Mr. Horner, did you or the Kosmos Company carry on any activities in conjunction with the Institute prior to your becoming a member in June, 1933?

A. I think not.

36982 By Mr. Withrow:

Q. Can you tell us, Mr. Horner, what the practice was of the Kosmos Company in reference to compiling rate information prior to receiving such information from The Cement Institute?

A. We had a full time traffic manager, and gathered our own information from tariffs.

Q. And did the Kosmos Company have any part in the preparation of the Institute rate books?

A. No, we did not, other than we objected a few times to certain rates, or, rather, said we thought they were wrong.

Q. In those instances where you said you thought they were wrong, what rate did Kosmos use?

A. If there was any question about a rate, we went to the railroad tariff and used that.

Q. You used what you thought was the correct rate?

A. That is right.

Q. Did you ever have any agreement with your competitors that you would use the Institute rate book, whether it was right or wrong?

A. We have not.

Q. And if you know, will you tell us how the expense of maintaining your own rate information com-
36983 pares with purchasing it from The Cement Institute?

A. The expense of obtaining our own information would obviously be a good deal more than the other.

36984 Washington, D. C.,
April 19, 1940.

36985 CHARLES HORNER thereupon resumed the stand and testified further as follows:

Direct Examination By Mr. Withrow (Continued).

Q. Mr. Horner, near the close of the hearing yesterday, you referred to taking up, calling to the attention of the Institute whenever you found any errors in the Institute rate books, and I will show you Respondents' Exhibits 162-A and B, and 163-A and B, and ask you if those are typical of the manner in which you handled such situations?

Trial Examiner Norwood: What situations?

Mr. Withrow: Errors in freight rate books that the Kosmos Company found.

A. These seem to be instances where we have
36986 done that. Apparently in one case we were right and in the other case we were wrong. I am not sure of that last statement. I cannot read this.

By Mr. Withrow:

Q. Now, Mr. Horner, in the event of a change in rates, do you apply the new official rate, or do you wait until you receive a supplement or correction notice from The Cement Institute?

A. We apply the new rate as soon as it is effective. Ordinarily we know considerably in advance of the effective date.

36990 Q. Mr. Horner, in the event of a change in freight rates, do you always issue new quotations to the trade, taking into consideration the change in freight rates?

A. Well, that all depends on the effect that any particular change might have on a destination price in which we are interested.

Q. And in the event of such changes in rates, would you tell us whether or not you advise your salesmen of a possibility of a change in the delivered price?

A. Well, we keep our salesmen up to date on all in-

formation of that sort. I can make that as a general statement.

36995 Q. Now, Mr. Horner, does Kosmos Company come in competition with foreign cement?

A. It does not.

Q. Has Kosmos ever agreed with any competing cement manufacturers to boycott dealers that trade is imported cement?

A. We have not.

Q. Has Kosmos ever agreed with completing cement manufacturers to establish or maintain uniform deviations from cement prices for the purpose of competing with foreign cement?

A. We have not.

36996 Q. Mr. Horner, I show you Commission's Exhibit 817-K, and ask you if you recall receiving that letter.

A. Yes, I recall this.

Q. Would you tell us what were the circumstances surrounding that letter?

A. It is a letter asking Mr. Raff to give the method of sale being used in Cleveland at the time. The reason I asked for the information was that we are always interested in the possibility of improving our methods at Cincinnati, and I feel that Cincinnati and Cleveland are somewhat similar situations.

At the same time we are not interested in the Cleveland market, and at that time he was not trying to sell in the Cincinnati market, so I felt that I could get a detached point of view in seeking the information.

Q. Then, the letter which is there, Commission's Exhibit 817-K, is an answer to a request from you?

A. That is right.

Trial Examiner Norwood: Who is this letter from, this Commission's Exhibit 817-K?

Mr. Withrow: It is from R. D. Raff, of the Diamond Portland Cement Company.

36997 Q. Now, could you have secured this information by sending salesmen up to the Cleveland market?

A. Yes, I could, but it was not important enough to go to that trouble. This was a very cheap and easy way.

Trial Examiner Norwood: Now, what did you ask from them when you wrote?

The Witness: I asked him what his sales methods were in the Cleveland market at that time.

By Mr. Withrow:

Q. As a result of this correspondence, did you enter into any agreement with Mr. Raff as to how cement should be sold in either Cleveland or the Cincinnati markets?

A. No. There was no intent of that sort in the thing at all. It was purely information I was seeking.

37061 Q. Now, Mr. Horner—I show you Commission's Exhibit 817-G and H, and ask you if you recall that memorandum?

A. Yes, I do.

Q. Will you tell us under what circumstances that memorandum was prepared?

A. I prepared this shortly after the N.R.A. went out as a possible substitute for it.

Q. And I believe the record shows that you handed them to Mr. Rader; is that correct?

A. That is my recollection; I handed it to him because he had been chairman of the Code Authority.

Q. And what reaction did you get from Mr. Rader?

A. Apparently Mr. Rader sent it to his president, Mr. Young, and Mr. Young wrote back, I believe, to Mr. Rader. I saw the letter afterwards. I am not quite certain whether Mr. Young sent me a copy directly or not. Anyway Mr. Young's reaction was that the plan was very questionable legally, and on second thought I rather agreed with
37062 him, and that was the end of the thing.

Q. Did you take that plan up with anybody else?

A. No. That was the end of it.

Q. And to your knowledge, was it ever discussed at an Institute meeting?

A. No; I have no recollection of such a discussion.

Trial Examiner Norwood: Let me see it.

(The document was handed to the Trial Examiner.)

Trial Examiner Norwood: Now, does this contain some of the things that afterward appeared in the Compendium?

The Witness: Well, I am not at all familiar with the Compendium, but I should not think so. That was my own idea.

Trial Examiner Norwood: Well, was it?

I just would like to know, you submitted this for discussion and consideration, didn't you?

The Witness: Well, I cannot say that I submitted it to The Cement Institute officially. I handed it to Mr. Rader because he had been chairman of the Code Authority and this was at a time when we were all wondering whether the N.R.A. would be reestablished in some form.

By Mr. Withrow:

Q. Well, this Compendium that the Examiner referred to, did the Kosmos Company agree with any competing manufacturers to adopt the practices and terms contained in the Compendium?

37003 A. No, we did not. I don't think I have read the Compendium. I know we received a copy or copies of it.

Trial Examiner Norwood: In this paper, Commission's Exhibit 817-G, you say the great overproductive capacity of the industry is largely due to that policy in the past. That is largely due to competition, the policy of companies trying to get volume and maintain price at the same time; you refer to getting volume by secret price cuts at the time.

The Witness: Yes.

37009 *Cross-Examination By Mr. MacIntyre.*

Q. Mr. Horner, yesterday in connection with Respondents' Exhibit 2757-B, which shows sales in terms of
37010 barrels that you made to the Government, I believe that was "A," and that "B," was the supporting data. Do you recall it?

A. In general, yes.

Mr. MacIntyre: I would like to ask Respondents' Counsel now if they will hand me the supporting data, which was marked. He had it here yesterday. It is a single sheet.

Mr. Withrow: For what purpose?

Mr. MacIntyre: So that I may ask the witness further questions about it.

(Mr. Withrow hands the document to Mr. MacIntyre.)

By Mr. MacIntyre:

Q. Now, referring to this Respondents' Exhibit, for identification, 2757-B, can you tell us, Mr. Horner, whether the 730 barrels of cement shown thereon to have been sold to W.P.A. in 1935 was sold by you to W.P.A. direct before

the issuance of your marketing policy of April 13, 1935, now in evidence as Respondents' Exhibit 2768?

A. I have no way of knowing when this cement was shipped or sold outside of the year.

Q. Can you cite us now to any instance where you sold W.P.A. requirements; that is, sold the Government W.P.A. requirements direct between the dates of April 13, 1935, and July 2, 1937?

A. I cannot cite any definite instance, no.

Q. But you do know that since July 2, 1937, you 37011 have sold W.P.A. direct, as you testified yesterday?

A. In certain places.

Mr. Withrow: Then I am going to have to object because it improperly states the record. The witness did not limit the time of such sales as being subsequent to the complaint. He said he knew they had quoted and had made sales, and I object to the question as improperly stating the record.

Trial Examiner Norwood: The objection is overruled.

Mr. MacIntyre: I am relying merely on the witness' testimony, as I understood it.

Mr. Withrow: Why don't you cite it correctly?

Trial Examiner Norwood: Go ahead.

By Mr. MacIntyre:

Q. I believe you stated that the issuance of your dealer policies, which are in evidence as Respondents' Exhibits 2767 and 2768, were copies of one of your competitors, or you imitated them, I believe.

A. They are imitations of them. I do not believe they are exact copies.

Q. Were they those of the Lehigh that you referred to when you referred to a competitor?

A. I am not certain whose it was we used.

Q. Now, referring to Respondents' Exhibit 2769-A and B, which is a notice of a dealer policy of yours of 37012 1931, can you tell me, Mr. Horner, whether or not that was the first notice that you gave to any of your dealers of that change in your policy?

The Witness: May I have that question?

(Question read.)

Mr. Withrow: I would like to have the record show that the witness has not been referred to the document, although the question says he has.

Trial Examiner Norwood: Read that statement.

(Statement by Mr. Withrow read.)

Trial Examiner Norwood: Show him the document. Read the question again.

(Question again read.)

Trial Examiner Norwood: Can you answer that without seeing the document?

The Witness: Seeing the document would help me a good deal. I hardly can answer it without.

Mr. MacIntyre: Does Mr. Withrow have the document?

Mr. Withrow: No.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

(Mr. MacIntyre hands the document referred to to the witness.)

Trial Examiner Norwood: The witness is referring to what exhibit now?

Mr. Withrow: Respondents' Exhibit 2769-A and
37013 B, Your Honor.

By Mr. MacIntyre:

Q. Is that the first notice that you gave to any of your dealers of that change in your policy as noted there?

A. I cannot say. It appears to be a recent change from the fact that we used this stamp.

Q. It could have taken place several days in advance of this?

A. I should think so, yes.

Q. I will now show you Respondents' Exhibit 2763, and ask you, Mr. Horner, whether the Kentucky Lumber & Supply Association wrote that letter to you as a dealer of yours?

A. Apparently they wrote this letter to us but not as a dealer of ours. This is an association of dealers.

Q. It is not a dealer of yours—that is, the writer of the letter?

A. Oh, the writer of the letter. Really, I cannot say whether he is or not. He does not give his full business name here.

Q. The Association does not buy from you, does it?

A. No.

Q. I now refer you to Respondents' Exhibit 2758, Mr. Horner.

37014 Q. And referring to page "U" of that exhibit, which is your bid showing the prices that you bid, are those prices at your mill,—f.o.b. your mill?

A. Yes, those prices are f.o.b. our mill.

Q. And do they include cash discounts?

A. They include everything, package and cash discount.

Q. What kind of package?

A. Well, the requirements are prices on cloth sacks, paper sacks, and bulk.

Q. They are shown in all three?

A. That is right.

Q. Now, was there a base applicable at your mill at the time you submitted that bid?

A. Yes, there was.

Q. And what was that base price at that time?

A. $2.25. Wait a minute. $2.15 in cloth sacks.

Q. In cloth sacks?

A. Yes.

Q. And your bid here was $2.15 in cloth?

A. That is right.

Q. And what about the $2.65 price there that was above your base price; that is in car lots of cloth?

A. This was a different kind of cement, I believe.

37015 Q. Was that above your base price?

A. That was on high early strength cement.

Q. Well, referring to that $2.40 in the same column, carload lots in cloth, was that above your base price, that was regular Portland cement, wasn't it, on that $2.40 price?

A. I have to look through the invitation on that. I believe that was something special, too. The quality is different.

(The witness examines some documents.)

If I read this bid correctly, that last price is for sulphate-resistant cement, special type.

Q. That is in the class of regular Portland, though, with some special specifications within that class, isn't it?

A. It is Portland cement, but of a very special composition; the same composition they used on the Boulder Dam, I think.

Mr. Withrow: That is the $2.40 price you are referring to?

The Witness: Yes.

By Mr. MacIntyre:

Q. The $2.15 price is in that same column, of course, on regular A.S.T.M. specifications?

A. Well, they were on regular and on what we call modified Portland, a small change from the regular, but the other was very much change.

Q. What is the highest mill net that you secure on any of your business, Mr. Horner?

37017 Mr. Withrow: I asked him what he meant by mill net, that is all.

Mr. MacIntyre: Yet we cannot find out what it is.

Trial Examiner Norwood: This is cross-examination.

Mr. Withrow: It is cumulative. They put on invoice after invoice from this company to prove it.

Mr. MacIntyre: There is nothing in the record to show what this spread is of this company.

Trial Examiner Norwood: The objection is overruled.

By Mr. MacIntyre:

Q. What is or was at the time of the bid the high and the low on mill nets, Mr. Horner?

Mr. Withrow: Your Honor, I object to that question. Further, it relates to a time subsequent to the complaint; he is now talking about 1938, and I add that objection to the new question.

Trial Examiner Norwood: Read the question.

(Question read.)

Mr. MacIntyre: I will restate it, Your Honor, please. I trust the next time I state it there will be no objection. I will name it as of July 1, 1937.

Trial Examiner Norwood: Answer the question.

The Witness: May I have the question read now?

(Question again read.)

37018 The Witness: I understand the question to be what was the difference between our highest mill net and our lowest mill net on July 1, 1937?

By Mr. MacIntyre:

Q. I would like to know what they are.

A. I cannot possibly answer that without the records.

Trial Examiner Norwood: What were they, and the difference can be calculated if you give us the high and the low.

The Witness: I cannot answer that without the records.

Trial Examiner Norwood: Could you estimate it?

The Witness: Oh, I could say that our ordinary differences will run 20 to 25 cents a barrel.

By Mr. MacIntyre:

Q. The highest you get is your base price of $1.75?

A. Whatever our base may be at the time is the highest we can get on railroad shipments.

Q. That was your base price as of that date, wasn't it?

A. I cannot say for sure without having the records.

37019 Q. Do you secure more than your base price on water shipments when you make deliveries and the return that you get is on a railroad delivered basis?

A. That is a debatable point. It depends on how much the cost of water delivery is. I think there are some sporadic instances that they do.

Q. You reported to Professors Clark and Burns that you do get in excess of your base price on that method of delivery, didn't you?

Mr. Withrow: Your Honor, I object to the question. The question of his reports to Clark and Burns are not in issue here. The mere fact that an answer to their question is in evidence is no reason to take up the time.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: The Counsel knows that that is perfectly legitimate cross-examination.

The objection is overruled.

A. Our report will show what we said. I cannot say of my own knowledge.

By Mr. MacIntyre:

Q. Whatever it shows you are willing to stand by?

A. I presume it is accurate, yes.

37020 Q. Now, yesterday, Mr. Withrow questioned you considerably about your deliveries to trucks, buyers' trucks at your mill, and you testified about delivery to truckers at your mill. Wasn't it generally the case, Mr. Horner, that those truckers hauled for dealers who bought from you regularly by that method of delivery and also by railroad delivery?

A. We had some difficulty with that. The truckers at some times would represent themselves to be hauling for a certain dealer, and it would appear from the dealer later that that was not the case.

Q. But generally he did haul for the dealers?

A. I could not make any generalization about that.

Q. You did not make it a practice of selling them unless you thought they were representing the dealers, though, did you?

A. I think our practice varied about that. The whole thing did not last very long, but I think in general that we thought they were hauling for dealers, yes.

Q. It would have been in conflict with your policy to have delivered to the truckers at your mill, otherwise, wouldn't it?

A. I cannot remember our exact practice at that time, but I know we would not have gone very far with such a practice without getting into trouble with our dealers.

Q. And you discontinued on January 1, 1933, the delivery to trucks as a practice?

37021 A. I do not remember the date. I suppose there is some document that shows it.

Q. I think it is in the record.

And these special instances during which you have delivered to trucks since then have been on a price basis of rail delivery at destination, hasn't it?

A. Well, the special instances I spoke of are road jobs close to the mill, where we put the cement on trucks at our base figure.

Q. Well, in those instances the purchaser paid your base figure plus railroad freight to the point of destination?

A. There was no railroad freight involved because the job was right practically at the mill.

Q. Was at the mill, you say?

A. Practically so.

Q. Three or four miles?

A. Yes.

Q. So in that case he paid the base to which you add freight for delivery to other destinations; is that correct?

A. In that case our price was our base figure because there was no freight involved.

Q. Now, these instances where transportation men told you—that is, the truckers who you made it a practice to deliver to—told you that they had been sent by dealers, you were in position to call the dealer and ascertain

37022 the truthfulness of this statement, weren't you?

A. I think that depends on the time of day. They usually got there late in the evening on the way back from Louisville. I think that was one cause of the difficulty.

Q. And did you consider the matter of asking your dealers to supply the men that they sent with credentials, signed credentials?

A. I really do not know whether they did or not.

Q. You just decided to refuse?

A. Well, the whole thing was quite small and raised a great deal of trouble, and we just abandoned it.

Q. So it did narrow itself down, didn't it, Mr. Horner, that it was a situation of some dealers complaining about you, that is, complaining to you about you delivering to trucks sent by other dealers to your mill; is that correct?

A. Frankly, I personally do not know enough about the complaints, and so forth, to answer that question.

By Mr. MacIntyre:

Q. Now, yesterday, I believe that you, when Mr. Withrow showed you Commission's Exhibit 1617, which is a letter from Mr. Hogue to Mr. Eugene Morris, do you recall that letter?

A. Yes, I do.

37023 Q. Of April 25, 1932, concerning these special rates, railroad rates in Cincinnati, do you recall it?

A. Is it about that subject? I thought it was short haul rates in general.

Mr. MacIntyre: Well, do you have it, Mr. Withrow, so the witness can look at it?

(Mr. Withrow produces the paper referred to.)

(Mr. MacIntyre hands the paper to the witness.)

By Mr. MacIntyre:

Q. I believe that you told Mr.—you have there the letter now:

A. Yes.

Q. I believe you told Mr. Withrow at the time he showed that to you that those matters were not taken up by you and your competitors, and then with the railroads. Do you recall your testimony on that?

A. I think that this letter confuses two things. One is the subject of short-haul line rate, and the other is the subject of switching rates. Speaking of switching rate first, the railroads at Cincinnati did come to us and got our business away from trucks by putting in lower switching rates. That was one subject; and entirely apart from the matter of short haul line rates.

We were interested in short-haul line rates, but we

hoped that they would be put in, and we had some
37024 correspondence with railroads, and I think that Mr. Cole, representing the cement companies before the railroads—

Q. Now, this 1617—that is, Commission's Exhibit 1617, Mr. Hogue to Mr. Morris, shows that copy of this letter went to Mr. Cole, traffic manager of the Medusa Portland Cement Company.

A. Yes.

Q. You do admit that to that extent that your traffic manager did communicate with representatives of your competitors on the matter shown in that letter?

A. On that subject, it was a matter of general interest to a good many cement companies.

Q. On the matter as shown in that letter.

A. Yes.

I should like to add, though, that Mr. Cole had nothing whatever to do with switching rates at Cincinnati. That was purely a direct negotiation between the railroads and our own company.

Q. Now, when you make deliveries by water you quote on the same basis as if delivery is made by rail, don't you?

A. We try to make our price as low at the destination where the cement is going to be used as we figure other—

Trial Examiner Norwood: Well, is that a price figured on a rail basis, or not? In the absence of a lower competing price?

37025 The Witness: Well, we take the price that we believe is going to be at the destination where the cement is going to be used, regardless of how that may be arrived at.

Trial Examiner Norwood: How do you figure it?

The Witness: We figure it according to our information as to the price at that destination.

Trial Examiner Norwood: Do you sell cement shipped by water on rail destination prices?

The Witness: Ordinarily it is the rail transportation that makes the lowest price at any destination, and that is the price we try to meet.

Trial Examiner Norwood: You make no special allowance because of the water transportation?

The Witness: No.

Trial Examiner Norwood: No special price concession?

The Witness: We do not.

By Mr. MacIntyre:

Q. When you began the delivery of cement by water to a particular destination, where you have been delivering to only by rail, where you have been quoting a price based on a rail delivery, you do not make any change in your price quotations simply because you undertake water delivery, do you?

37026 A. Unless there is some other reason for changing the price, we do not change it, simply on account of the change in the method of transportation.

By Mr. MacIntyre:

Q. What is the practice, Mr. Horner, of the Government—that is, the U. S. Government—in its payments to you? Do you know of any instance other than this one that was referred to by Mr. Withrow yesterday where the Government withheld payment to you on a cement shipment of as much as a year?

A. I do not ordinarily see those things. I saw several instances, I believe, that were gathered together in this case, but I could not make any general answer to that.

Q. The general practice is for the Government to discount its bills in accordance with the terms of its

37027 contract with you, isn't that true?

A. As I said before, I am not close enough to that side of our business to say "yes" or "no."

By Mr. MacIntyre:

37028 Q. How could you state, then, yesterday, Mr. Horner, in response to Mr. Withrow's long statement of his offer of proof, that all of the statements made therein were true?

A. Well, didn't I say that, to the best of my knowledge, or words to that effect?

Q. No, I think it was unqualified, Mr. Horner. I call your attention to record—I do not seem to be able to find that just at the moment. There is an unqualified statement that the statement is true.

37029 Trial Examiner Norwood: Yes.

Well, it appears that he learned of those from documents that he does not have any first-hand knowledge regarding these matters. I thought that the material might just as well go in.

Mr. MacIntyre: The matter I am referring to
37030 begins at the top of page 36930 and continues through to where you deny my motion, line 8, page 36932.

I ask in so far as that is considered to be testimony that it be stricken from the record.

Trial Examiner Norwood: The motion is allowed.

Mr. Withrow: Your Honor, may I be heard? After all, the only thing that is testimony is the answer of the witness to Your Honor's question, and the proper thing is to strike your question and the witness' answer, which involves striking three lines on page 36931.

Trial Examiner Norwood: I think Counsel is correct about that. I mean, they stand there as his offer of proof.

Mr. Withrow: And if they deny that I could prove it I then could go into the matter with the witness. That is up to Counsel for the Commission to take the alternative. An offer of proof, as I understand it, is a dare to the other side, which they either can take or reject. If they do not think I can prove it, they waive their objection and I try to prove it, but if they continue to press their objections to resist the proof, why, that stands as the offer.

Trial Examiner Norwood: The Counsel has made a good point there, and I think the better way, probably, is to leave the record stand as it is and show the whole story.

37031 Mr. MacIntyre: I do not want it to stand that this witness has testified, and it has been accepted as testimony as to the offer of proof. I do not mind it standing as an offer of proof, and I understood it was Your Honor's intention when he first sustained the objection yesterday, and then proceeded to ask the question of the witness, that such answer as the witness would give would constitute a part of the offer of proof.

Trial Examiner Norwood: I will allow your motion so far as striking my question and his answer and my statement thereafter.

Mr. MacIntyre: Thank you.

Trial Examiner Norwood: Now, let us designate that.

Mr. Withrow: That is record page 36931, lines 10, 11, and 12.

Now, the next thing that follows is a motion to strike by Mr. MacIntyre, which was denied at that time.

Trial Examiner Norwood: Well, there is no harm in

letting that stand. Those three lines are all that is necessary.

Mr. Withrow: Thank you.

Trial Examiner Norwood: My statement is there that I answered Mr. MacIntyre.

Mr. Withrow: You mean my question and the answer is testimony?

37032 Trial Examiner Norwood: I made a statement there that it is now in the record as evidence. I want to strike that, too.

Mr. Brick: Well, your ruling allowing the present motion to strike takes care of that.

Trial Examiner Norwood: Now, does Counsel in his motion, then, include lines 24 and 25, down to and including line 5 of page 36932?

Mr. MacIntyre: Yes.

Trial Examiner Norwood: The motion is allowed as to that, page 36931, lines 10, 11, and 12, and the lines I have just referred to there will be struck.

By Mr. MacIntyre:

Q. Mr. Horner, yesterday Mr. Withrow asked you if you had received a tabulation of the so-called Good Friday bids, that is those bids that were received by the Federal Government under its invitation, which is an exhibit here, as Commission's Exhibit 1339, and you told him you had not received the tabulation; do you recall?

A. In saying that I meant we had not received tabulations from the same agency that took the bids, which is more or less customary.

Q. Did you receive a tabulation from any other agency of the Federal Government?

A. I think not.

37033 Q. You did know that the bids were opened at a public opening, didn't you, that you could have attended and ascertained what your bid, and all the others were, as read out in the public?

A. My recollection is not clear on that. I think we had someone here at Washington.

Q. To attend the opening?

A. To attend the opening. I think the information he got was not very good, or not very complete. Just why, I cannot tell you.

Q. It is a public opening, as the record shows, so if he cared to attend he could have ascertained.

Now, is it customary for you to receive tabulations direct from the agencies?

A. If we ask for them.

37034 Q. Did you receive any information, Mr. Horner, that these bids were not opened in public from your representative whom you sent to Washington?

A. My recollection is not clear as to just what he reported. I know that he did not succeed in getting a satisfactory tabulation.

Q. Is it customary for you to receive tabulations of bids from the Procurement Division of the United States Treasury Department?

A. I cannot say as to the Procurement Division. It is customary for us to get tabulations of bids from the Government agencies when we ask for them.

37035 Q. Now, this morning Mr. Withrow asked you a number of questions, and yesterday, about your traffic department; Mr. Hogue—Mr. Hogue is your traffic manager, isn't he?

A. Yes, he has that title.

Q. How long has he served you in that capacity?

A. For some years. I do not know just how long.

Q. Ten years?

A. It might be.

Q. Some time previous to your becoming a member of The Cement Institute, some years, isn't it?

A. I should think so.

Q. Mr. Hogue continues to check official tariffs of the railroad companies for railroad rates, doesn't he?

A. Well, actually while Mr. Hogue uses the title of traffic manager, and can read railroad tariffs, he is not a highly qualified expert along that line. We employ a regular traffic man on part time who does that sort of work. The reason we do not allow him to sign letters for us is that he is not a regular employee.

Q. Well, as between him and Mr. Hogue, the two of them check the official tariffs as to all rates you use for your shipping purposes; do they? Is that correct?

A. Our practice is to keep a card system which shows our rates, and keeps them up to date. The rates on those cards come either from the tariffs or from the Institute rate book.

Q. Mr. Horner, I am still asking you the question
37036 as to whether or not Mr. Hogue, and this other traffic manager of yours, checks the official tariffs for the rates you use for your shipping purposes.

A. I do not think they make a thorough check. I think at this time they rely on The Cement Institute freight rate books very largely.

Q. How do they discover the errors that occur in The Cement Institute freight rate books, and to which you have made objections to The Cement Institute?

A. Well, when a rate strikes them as wrong, they would go into the tariffs. Naturally, when you are handling rates all the time you notice any variation that you think is probably a misprint.

Q. So it is only random checks of The Cement Institute freight rate books that they discover its errors?

A. They probably would not discover an erroneous rate unless they had some occasion to use it.

Q. What service to you for shipping purposes does the information purporting to show freight rates from other cement producing points in The Cement Institute freight rate books serve you?

A. It does not serve any apparent shipping purposes.

Q. Only for pricing purposes?

A. It is a guide to what our competitive conditions are likely to be at any point.

37037 Q. It is a means by which you can anticipate your competitors' prices at particular destinations; is that correct?

A. It is a method that helps us to anticipate prices if we do not have any more direct information from the particular point or destination involved.

Q. Now, eliminating all that information as to freight rate information from other points than your own to all the destinations, and just coming down to the freight rate information in those books showing the rates from your producing point to destinations—

Mr. Withrow: May I have that question read?

Mr. MacIntyre: I have not completed the question.

Trial Examiner Norwood: Wait until he finishes it.

Mr. Withrow: Pardon me. I was going to say I thought it was a statement.

By Mr. MacIntyre:

Q. (Continuing.) —is the amount that you pay The Cement Institute for all that appears in its rate books any more or any less than the amount that you have to pay Mr. Hogue, say, for securing the rates from the official tariffs from your shipping points to the destinations to which you ship?

Mr. Withrow: May I have that question?

The Witness: May I have that question, please?

Trial Examiner Norwood: Read the question.

(Question read.)

37038 Mr. Brick: We object to the question, Your Honor please. Even as corrected it is not sufficiently clear for the witness to understand the point.

Trial Examiner Norwood: Objection overruled. Answer the question.

A. I think that question begs the situation. If we did not have the rates from other producing points through the freight rate book, we would still gather them for ourselves through the tariffs.

By Mr. MacIntyre:

Q. And not for shipping purposes, though, would you, Mr. Horner?

A. Not for our own shipping purposes; no. We gather what we consider necessary information in directing our business.

Q. What I am attempting to determine from you, Mr. Horner, is whether or not the information that appears in The Cement Institute freight rate books, that could, under any rule, be used by you for shipping purposes, cost you more than information that is necessary for use by you for shipping purposes, supplied by your traffic manager?

Mr. Withrow: We have the same objection to that question, Your Honor.

Trial Examiner Norwod: Objection overruled.

Mr. Withrow: It is unintelligible.

Trial Examiner Norwood: Objection overruled.

37039 A. I find it very difficult to make any such comparison.

By Mr. MacIntyre:

Q. You have never done so, have you?

A. It is entirely beside the point, I think.

Q. Well, will you answer the last question, Mr. Horner,

as to whether you ever made a comparison for the purpose of determining the costs on those two items?

A. The question is whether I made a comparison between what we pay for The Cement Institute freight rate books and what is the cost to compile our own shipping rates out of the tariffs?

Q. No; use them from the tariffs, not compile them, because they are already compiled in the tariffs—use them as they appear in the tariffs.

A. It would be very difficult to segregate that cost.

Trial Examiner Norwood: Have you ever made a study of that?

The Witness: I will say this, that to get our own rates out of the tariffs is no great job.

By Mr. MacIntyre:

Q. You have never yet answered the question, Mr. Horner, as to whether or not you made a study for the purpose of comparing that matter.

37040 A. No; but it has never occurred to me to make any such study. It is entirely beside the point, I think.

Q. Now, your testimony shows that you furnish your salesmen with a list of basing-point prices, and you also furnish them with Cement Institute freight rate books. Is that all that is necessary for that salesman to use in figuring a price?

A. No. The chief thing for him to use in figuring a price is to go to the destination point and find out what is actually going on.

Q. But when he is asked to quote a price and circumstances do not permit him to make an immediate check before the quotation is made, he uses those two factors; is not that correct?

A. We find that usually prices are made by taking a base figure and adding the freight rate to it, and in default of more definite information from the destination point we attempt to forecast our competition in that way.

Q. And your salesmen are so instructed?

A. They are qualified to do it, although they have to know the prices in the various points of sale.

Q. This morning Mr. Withrow showed you Commission's Exhibit 817-K, which is that letter of Mr. Raff to you.

A. Yes.

Q. And your reply. Do you recall that?

A. Yes.

Q. Did you turn over to your counsel your let-
37041 ter to which Mr. Raff's letter is a reply?

A. No; we have never been able to locate that letter in our files. Our counsel asked us several times to research the files, which we did, but we have never been able to locate it. Since Mr. Raff's letter came into the case, I remember that I did write a letter to him and asked him for that information. It was just an ordinary request. I do not think there was anything of importance in it, that is not covered by his reply.

By Mr. MacIntyre:

Q. Do you recall all that you said in that letter that you sent to Mr. Raff?

A. No; I only recall the substance, that I said that I would like to know what his present methods of doing his business in Cleveland was, as a guide for markets in which I knew he was not interested.

Q. Can you tell us whether or not, during January, 1938, when you received a subpoena from the Federal Trade Commission for the letter that you wrote Mr. Raff, it was in your file?

A. I presume not. It would have come out at that time if it had been.

37042 Q. Can you state that it was not there at that time?

A. No. Naturally I cannot. It would have come in if it had been in the files.

Q. You told Mr. Withrow that you do compete with Mr. Raff in some parts of the State of Ohio. Is the City of Columbus one of those points?

A. No, we do not attempt to sell in Columbus any more.

Q. What are some of the points in Ohio where you compete with Mr. Raff?

A. Well, I can only state from general knowledge. I assume that he would come down, say, to Wilmington, Ohio, or something like that, and we go out that far.

Q. The two of you sell in Wilmington.

A. I am pretty sure we sell an occasional car there. Whether he does or not, I couldn't say, but just from looking at the map I would think he does try to.

Q. Has your resignation from The Cement Institute become effective?

37043 A. From a legal standpoint, I am not qualified to answer the question. He covered the facts yesterday.

By Mr. MacIntyre:

Q. That is, that you gave notice to resign, that you were resigning?

A. We gave notice that we were resigning, I think, in November, 1937. We paid dues for 12 months thereafter, which was one of the provisions of the by-laws.

Q. Are you continuing to secure from The Cement Institute freight rate service?

37044 A. Yes; I believe we are still buying the freight rate books.

By Mr. MacIntyre:

Q. You have that much in common, then, with The Institute, even down to the present time?

A. Yes. Of course, we buy those books.

Q. Now, yesterday, Mr. Withrow asked you about the payment of freight by the dealers to whom you sell, to the railroad, on shipments that you made to them, and you told him that such shipments were made by those dealers to the railroad for your account. Do you recall that?

A. Yes.

Q. Has the railroad ever made any accounting to you of the payments thus made to them?

A. Perhaps not, but if a car should arrive at destination, and somebody did not pay the freight, we would hear from the railroad. I think we have on certain occasions.

Q. No accounting is ever made by the railroads of the money that they receive for your account, as you call it, from the people to whom you consign the shipments?

Mr. Withrow: In order to save time, Your Honor, Counsel for the Respondents are willing to concede that the railroads do not, under normal circumstances, report to the cement companies, or make an accounting to the cement companies of the amount of freight paid by dealers for the account of the cement companies.

37045 Mr. MacIntyre: Does that go as to all of these Respondents prior to the time that they began to pay the freight, on January 1, 1940?

Mr. Withrow: That is my statement.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: I wanted to know whether it applies to all.

Trial Examiner Norwood: That settles that matter. Proceed.

Mr. Withrow: I have always thought that this whole line is immaterial.

By Mr. MacIntyre:

Q. Now, Mr. Horner, you stated yesterday, in response to a question of Mr. Withrow, that a buyer of your cement in one city does not care what the user in another city who buys from you pays. Do you recall that testimony?

A. Yes; I do.

Q. How can you reconcile your statement in that testimony to that effect with the statement that you made in Commission's Exhibit 970-A to 2-C, which is part of the Burns questionnaire, to the effect that some of your dealers and buyers did complain to you about your use of the basing-point system, because some buyers in
37046 other towns farther from your mill secured their cement in such a manner as to result to you in a lower price or mill net.

The Witness: I had very little or nothing to do with the answer to the Burns questionnaire.

Trial Examiner Norwood: Do you have the statement there to show him?

Mr. MacIntyre: That statement does appear in your answer to the Clark-Burns questionnaire, which is the exhibit I referred to.

By Mr. MacIntyre:

Q. Who in your company made the reply, Mr. Horner, to that Clark-Burns questionnaire?

37047 A. Several people worked on it. I can't say who handled each question.

By Mr. MacIntyre:

Q. Mr. E. M. Clancy, your secretary, participated?

A. I think he probably put it together.

Q. And your sales manager participated?

A. I should think so.

Q. And you reviewed it in the end of its work?

A. I think they asked me on several points. Which they were, I couldn't tell you now.

Q. That is, for your review.

A. Yes.

37048 Q. And subsequent to that it was sent to the Professors?

A. I suppose so.

37049 Q. Mr. Horner, showing you Respondents' Exhibits 2755-B to Z2, I ask you to state whether or not it is your testimony that you did not have information as to prices at those locations before you saw those quotations of your competitors?

A. We had been doing business at those places; I assume it was on the dates of these quotations, and if we were doing business at them we had information about the prices there.

Q. Then, do I understand that you do not wish to testify that you did not have information as to those prices before you got the quotations?

A. As to this particular price shown on this quotation, I assume this is our information about it. Whether it is different from what had been going on before, or what went on afterwards, I could not say.

By Mr. MacIntyre:

37050 Q. Well, aside from your assumption, what is your knowledge about it?

A. My knowledge is that we pick up this sort of thing all the time, and keep in touch with the market.

Q. I am asking you about prices that are shown on these quotations. What is your knowledge about your first information as to those prices?

A. I couldn't say whether—this company may have been quoting this price several months before. We may have had a previous quotation that said the same thing as that.

Q. In other words, you cannot testify whether this is the first information you received?

A. There is no way of my telling that, whether this is the first quotation they put out at this price at that point.

Q. Can you tell us just what you know about how this came to your office, as to whether your salesmen sent it to you, or just how it came to your office in Louisville?

A. Well, I feel sure that they were sent to us by our salesman. I don't know any other way that we could get them. Possibly a dealer might send some of these.

Q. But you do not know, except what your salesman told you, as to where he got these particular quotations; is that correct?

A. Well, it shows pretty well on its face where it came from.

Q. But other than what you assume as to what
37051 is shown on them, and what your salesman told you, you know nothing; is that correct?

A. Well, this quotation shows that it was sent to a certain dealer at a certain place. I assume that is where it came from.

Q. That is all you know about it.

A. Yes.

Q. Do you sell to the Morres Coney Company in Cincinnati?

A. Yes, we do.

Q. Is it your testimony, Mr. Horner, that that
37052 company is not equipped to figure freight rates from your mill to Cincinnati?

37053 A. I do not know whether they are or not.

By Mr. MacIntyre:

Q. Do you know whether it maintains a traffic department?

A. No; I don't know.

Q. But you do know that a number of your other customers maintain traffic departments?

A. That is something I don't know.

Q. If you do not know, how could you testify that they do not maintain traffic departments?

A. I made a general statement. I would not say that there are not some exceptions to it. There may be.

Q. Now, Mr. Withrow asked you yesterday about some of the sources from which you secure base price information. He asked you if you secured it from The Cement Institute, from your competitors, and the like. Do you recall that testimony?

A. I don't recall exactly on that; no.

Q. I will ask you whether or not you secure such information from any source?

A. Yes, we do. We find what the markets are in the field, and find out all we can about them.

37054 Q. Do you get the base price information and get the base price list in that way?

A. We work them back from the destination prices that we find.

Q. Do you hand the price lists to anyone other than your salesmen?

A. No; they are kept in our office and given to our salesmen.

Q. Mr. Horner, Mr. Withrow asked you about Commission's Exhibits 817-L, G, and H. Do you recall that?

A. Let me see them.

(Mr. MacIntyre handed documents to the witness.)

Mr. Withrow: Mr. Horner was not asked about 817-F.

The Witness: Yes, I remember this 817-G.

By Mr. MacIntyre:

Q. Do you recall your testimony about that?

A. Yes, I do.

Q. Now, on line 16, page 12434, you testified you thought that that handwriting on Commission's Exhibit 817-F was Mrs. Clancy's, and I believe you also testified to the same effect concerning the handwriting that appears on Respondents' Exhibit 2750-A.

A. Yes.

Q. That is the same handwriting, is it not?

A. I should say so, without being much of an expert on those things.

Q. Well, you are acquainted with Mr. Clancy's
37055 handwriting, of course.

A. Yes; I see it.

Q. Now, you told us, at Chicago, at that particular page of the testimony that I referred to, as well as again this morning, that you gave that memorandum, which is Commission's Exhibit 817-G and H, to Mr. Rader. Will you tell us where he was when you handed that to him?

A. Well, I think probably at the office in Chicago, of the Code Authority.

Q. You gave it to him on the day that your memorandum is dated, December 6, 1935, or some time subsequent to that?

A. I couldn't say. It must have been in that neighborhood.

Q. That is, on or about December 6, 1935.

A. I should say so.

Q. And you gave it to him in an office on the eighth floor of the Conway Building at 111 West Washington Street, Chicago.

A. I don't remember about the floor, but it is the Conway Building.

Q. Did you dictate that in his office?

A. No; I am pretty sure I had this prepared before I went there.

Q. And you carried it up to Chicago to him?

A. Yes.

Q. If you dictated it in Louisville and placed on it the date of December 6th, that was probably the date on
37056 which you dictated it in Louisville.

A. I think very likely so.

Q. And you probably gave it to him, then, within two or three days of that date?

A. I assume so. I have no direct recollection of it.

Q. How did you happen to be in Chicago two or three days subsequent to the date appearing on that memorandum?

Mr. Withrow: Your Honor, I object to the question. I do not see how it has any materiality or relevancy to any of the issues in the case. It is admitted that he gave it to him. How he happened to be in Chicago—

Trial Examiner Norwood: Overruled.

A. I could not tell you now why I was there. I go to Chicago every once in a while.

By Mr. MacIntyre:

Q. Now, Mr. Horner, the record shows that Commission's Exhibit 817-1-I and 1-J are produced by you from your files, pursuant to a subpoena duces tecum. Can you tell us how that came into your possession?

Mr. Withrow: Which was this; what number?

Mr. MacIntyre: 817-I and J. You asked him about it this morning, I believe.

A. This is—

Mr. Withrow: Wait a minute. Let me see this. I would like to point out, Your Honor, that in spite of Mr.
37057 MacIntyre's statement I did not ask him any questions about 817-I and J. I asked him about G and H.

I object to it as going beyond the scope of the direct examination.

Mr. MacIntyre: The witness testified about it, anyway.

Trial Examiner Norwood: Is it on the same subject matter? What is it?

Mr. MacIntyre: A letter that he testified this morning he recalled having seen, which Mr. Joe Young, president of the Lehigh, wrote to Mr. Rader in comment upon this memorandum, which is Commission's Exhibit, for identification, 817-G and H.

Trial Examiner Norwood: What would this witness know about that?

Mr. MacIntyre: He produced it under a subpoena duces tecum, and I am asking him how it came that he received the letter.

Trial Examiner Norwood: I think that you may ask him that.

Mr. Withrow: I would like to point out, Your Honor, that this witness was a witness for the Commission once before, and so perhaps the usual reasons for allowing him to go beyond the scope of the direct does not exist in a case of this kind.

I object to it. It takes up time unnecessarily.

37058 Trial Examiner Norwood: This goes to the circumstances surrounding this paper here. You have asked him to explain that paper and say that it was something that he sent to one of the parties here, and I think he can bring out any further explanation that this witness can give.

Objection overruled.

A. I testified this morning that I knew the contents of Mr. Young's reply. I was not quite certain how I had received the information. I thought possibly Mr. Young might have sent me a copy of his letter to Mr. Rader.

By Mr. MacIntyre:

Q. Through the mail direct to you?

A. I thought he might have. I did not remember whether he did or not. I said now that he replied to Mr. Rader, and then Mr. Rader sent this to me, inasmuch as I handed my memorandum to him.

Q. Isn't it your recollection, Mr. Horner, that Mr. Rader personally handed you that typewritten copy?

A. This?

Q. Yes.

A. I have no recollection whether he handed it to me or whether I got it from him through the mail.

Q. But you do have a recollection, as you stated this morning, of having received a copy of Mr. Young's
37059 letter to Mr. Rader commenting on your memorandum.

A. I testified that I had received the information in this letter. I was not certain whether it had come about, as it evidently did, by Mr. Young replying to Mr. Rader, and Mr. Rader passing on the reply to me, or whether Mr. Young had sent me directly a copy of his letter to Mr. Rader. It was about my memorandum, in any case.

Q. You do not intend your testimony to be at this time that Mr. Rader did not give that letter to you personally on another trip that he made to Chicago?

A. I haven't the slightest recollection whether he did it that way or whether he sent it to me by mail.

Q. What did you tell Mr. Rader when you handed him your memorandum, which is in the form of Commission's Exhibit 817-G and H?

A. I do not know what I told him.

37060 Q. Don't you recall, Mr. Horner, that you requested Mr. Rader to present this at a board of trustees' meeting of The Cement Institute on December 9, 1935, three days after that letter was written—that memorandum was written?

A. I do not recall any such request, no.

Q. Is it your testimony that you did not tell him to present that to the board of trustees?

A. I can't testify one way or the other on that. I have no recollection.

37061 Q. Now, on direct examination today, Mr. Horner, you testified that you did present this to Mr. Rader as a suggestion of yours of something to replace the Code, which had gone out.

A. That is right.

Q. And you did know that these trustees were meeting just the next day for the purpose of deciding what course of action should be taken by The Cement Institute after the Code had gone out, didn't you?

A. I can't say at this time whether I knew the trustees were meeting then or not. I was not a trustee myself. I may have known it, or I may not have known it. I couldn't tell you. So far as I know, this was never presented to the trustees as a body.

Q. Well, you have been informed that the trustees did consider trade practice plans at the meeting the next day after you submitted it to Mr. Rader; is that correct, and that they had adopted—

A. Just a minute.

Unless I had seen the minutes of the meeting, I would not have known. I do not know whether I saw the minutes of that meeting or not.

Q. This memorandum was written by you before you went to Chicago as an expression of your experience in the industry, wasn't it?

A. It—yes, it does reflect my experience.

37062 Q. You did know at the time you handed this to Mr. Rader that he had considerable to do with the trade practice committee of The Cement Institute; is that correct?

A. I can't say at this date how much I knew about the trade practice committee of The Cement Institute.

Q. You also did knew, didn't you, Mr. Horner, that Mr. Rader was an official of the company which had a few years previously placed a base at your mill at Kosmosdale, Ky.?

37063 A. I testified when I was on the stand before, as nearly as we could find out from the destination prices, it was the Lehigh Company that first figured a base at our mill, and, of course, Mr. Rader is an official of the Lehigh Company.

By Mr. MacIntyre:

Q. Who was present when you handed this memorandum to Mr. Rader?

A. I can't remember the occasion at all, but I will say that we were alone.

Q. Just a moment.

37064 Mr. George Reiter, of The Cement Institute, was not there?

A. I am quite sure he was not.

Q. Did you go to Chicago on this occasion for the purpose of attending meetings of The Cement Institute and of the Portland Cement Association?

Mr. Withrow: If Your Honor please, I object to this question. That was already asked; and, second, the question is irrelevant and immaterial. Whether this witness went to attend meetings of the Portland Cement Association has no bearing.

Trial Examiner Norwood) Overruled.

A. I don't remember.

By Mr. MacIntyre:

Q. What about meetings with competitors such as Mr. Rader?

A. What is the question?

(Last question read.)

The Witness: I don't understand the question.

By Mr. MacIntyre:

Q. Did you go to Chicago for any other purpose than to give this to Mr. Rader and discuss it?

A. Well, I can't remember now. I often go to Chicago to see the railroads, and that sort of thing. I probably combined this with some other business.

Q. What did Mr. Rader say to you when you
37065 handed him the memorandum?

A. I can't remember.

Q. You discussed the contents of it with him, didn't you?

A. I suppose we did; yes.

Q. Now, in your testimony here to the effect that you had no communications or discussions or understandings or agreements with your competitors concerning prices, I ask you, did you take into account, when you made that statement in reply to Mr. Withrow's question, your letter, which is in evidence as Commission's Exhibit 3211-A, B, C?

Mr. Withrow: Just a moment.

Mr. MacIntyre has again misquoted the record. There is no such testimony by this witness. He was not asked a question as to whether there had been discussions of this and that; he was asked a simple question as to whether or not he entered into any agreement.

I would like to have Mr. MacIntyre at this time point out the record page, because repeatedly this afternoon he has attempted by his questions to change the testimony. He misstates the record entirely and infers that some things have taken place which have not taken place.

37066 By Mr. MacIntyre:

Q. I will ask you then, Mr. Horner:

Notwithstanding the testimony that you have given on

direct examination, you will, in the light of Commission's Exhibit 3211-A, B, C, now admit that you have discussed the matter of prices with your competitors, will you?

A. I did not quite like your phrase there, without citing me just what I have said before.

Q. Well, that is not characterizing it one way or the other.

Trial Examiner Norwood: What are the facts as you remember them?

The Witness: May I have the question?

37067 Trial Examiner Norwood: Read it.

(Question read.)

A. The Examiner asked me to make a general statement. In the light of this letter, I shall have to say that I did write to Mr. Speed, and the word "price" is used in that letter, I believe.

By Mr. MacIntyre:

Q. And also in the light of Commission's Exhibit 817-G and H, you will admit that you discussed or passed to Mr. Rader, of the Lehigh Company, a memorandum in which prices were discussed, will you; and in that connection, a method of preventing price cutting?

A. Well, I admit I passed that memorandum to Mr. Rader. It will show for itself what it is about.

By Mr. MacIntyre:

Q. Now, I will ask you, Mr. Horner, whether or
37068 not you pay anything to The Cement Institute for the present freight rate service you receive from it?

A. I do not think we pay in a separate sum at the present time. We are continuing to pay what we used to pay as dues. The money is being used as a common fund for the carrying on of this case, and when the case is over, as I understand it, if there is any surplus it will be redistributed; at that time we will be billed a proper amount for the freight rate service.

By Mr. MacIntyre:

Q. That is, from this surplus, if any?

A. That is right.

37069 Q. Now, do we understand from that statement of yours, Mr. Horner, that there is no difference in your dues as you formerly paid them?

A. I do not consider we are paying dues, but we are paying the same amount that we did pay as dues.

Redirect Examination by Mr. Withrow:

Q. Mr. Horner, when you were being questioned by Mr. MacIntyre about Respondents' Exhibit 2758, the parts which were received in evidence, especially part F, and you were telling him about on what product the various prices indicated here were, were you referring to the information contained on page 7 or 1, at the bottom of the page?

A. Yes, I was.

37070 (RESP. EX. 2758-I was offered and received in evidence.)

Q. Mr. Horner, Mr. MacIntyre asked you about the extent of the deliveries you made to trucks at the mill prior to January, 1933, I believe it was.

Do you have any idea as to the percentage of shipments which you made by truck at that time?

37071 A. I cannot answer in percentages. I know it was a small matter.

By Mr. Withrow:

Q. Was it less than five percent?

A. Oh, I am sure it was, yes.

Q. Now, Mr. Horner, do you allow dealers to come to your warehouse facilities in Cincinnati and take the cement by truck?

A. Yes, we do.

37072 Q. Mr. Horner, do you recall the testimony you gave on cross-examination about Exhibit 817-K?

A. I believe so.

Q. Now, as to the letter which you said you had written Mr. Raff, have you been able to find any record of that letter subsequent to January 4, 1938?

A. We have never been able to find it at all. I do remember, since Mr. Raff's letter came up—I remember that I wrote and asked him for the information. We have never been able to find my letter.

37073 Q. Mr. Horner, in cross-examination, you were asked a question about Commission's Exhibit 3211-A to C. Do you recall that exhibit (handing a document to the witness)?

A. Yes.

Q. Now, did you have any discussion with Mr. Richard Speed about that letter after the letter was written?

A. I had forgotten this letter completely until it turned up in this case. I have no recollection that anything followed it at all.

Q. Now, with reference to that letter that you were asked about a few minutes ago, from Mr. Raff to you, Mr. Horner, after receiving that letter, did you or did you not make any changes in your marketing practices at Cincinnati, Ohio?

A. I am pretty sure we did not. We made that inquiry just for the purpose of general information.

37077 By Mr. MacIntyre:

Q. You do recall that you testified on redirect that you make your facilities available to truckers for your dealers. Was it in Cincinnati or some other particular place that you referred to?

A. The question was, I believe, in regard to Cincinnati.

Q. What did you mean to testify in that respect?

A. I think I testified what I meant to testify, and that was that we allowed the dealers to send their trucks to our warehouse.

Q. For cement?

A. Yes.

Q. And only on a delivered price basis, as figured by rail?

A. That is right.

37085 M. MOSS ALEXANDER, called as a witness for
37086 the Respondents, being first duly sworn, testified as follows:

Direct Examination by Mr. Seeley:

I am president of the Missouri Portland Cement Company. I am the chief executive officer of Missouri. I
37087 am a member of the board of directors of the company, and have been since 1932. I came with Missouri on January 1, 1930, as district sales manager. I was district sales manager for one year. In 1931 I

was appointed general sales manager, and in the latter part of 1931 or the early part of 1932, I was elected vice president. I became president of the company in February, 1934 succeeding H. L. Block who died in January, 1934.

Q. Mr. Alexander, have you ever held any interest in any company engaged in the production or sale of cement other than the Missouri Portland Cement Company?

A. I have not.

Q. Let me ask you: Who determines the marketing policies of your company?

A. I do.

Q. And do you instruct the sales department to carry out those policies?

A. I do.

Q. Mr. Alexander, how does the Missouri Portland Cement Company quote prices on its cement?

37088 A. It quotes delivered prices at destination.

Q. And how long has that been the practice of your company—

A. Ever since—

Q. —quoting delivered prices at destination?

A. Ever since I have been associated with the company, and some time before I became associated with it; during the entire history of the company, according to our records.

The witness identified Resp. Ex. 2783 to 2788 as Missouri sales ledger sheets dated 1915, 1916, 1920, 1925, and 1930 made in the regular course of business of the company.

37089 *Examination on Voir Dire by Mr. Wooden.*

Q. Referring, Mr. Alexander, to Respondents' Exhibit 2783, for identification, and to the column headed "Price," is that delivered price there?

A. Yes.

Q. Yes?

A. Let me see this (examining the document referred to).

Yes.

Q. Now, after all these sheets, tabulations, are they a part of the original records of the company, or are any of them copies?

A. None of them copies.
Q. None copies?
A. No.
Q. All of them original records?
A. That is right.
Q. And these sheets that are headed "St. Louis Portland Cement Works" and "Kansas City Portland Cement Works" and the "Union Sand & Material Company," "Kansas City Portland Cement Works," were those plants that were taken over by the Missouri Portland Cement Company?

A. The new Union Sand Company purchased the
37090 St. Louis Portland Cement Company in 1907, and the Kansas City Portland Cement Company in 1908.

Q. Now, can you tell me the sources or the source of the information that is contained under the head "Estimated Freight," such as appears on Respondents' Exhibit 2786, for identification?
A. That is taken from the company's freight rate books which information is secured from published tariffs.
Q. That is true wherever that appears?
A. Yes.
Q. And why is it called estimated freight?
A. I cannot tell you why they call it estimated freight.
Q. Did you have any personal part in making up these records at the time they were made?
A. No.
Trial Examiner Norwood: What was the answer?
(Answer read.)

By Mr. Wooden:

Q. What was your position with the company in 1930?
A. District sales manager.
Q. What district?
A. St. Louis district.
Q. You had nothing to do in the office of your company with making up these records at the time they were made?

A. With the exception of the 1930 tabulation.
37091 Q. What did you have to do with it; that is, Respondents' Exhibit 2788, for identification?
A. A clerk in the sales office made it up under my direction.
Q. Well, then, can you tell me with regard to that exhibit why the freight was estimated and from what sources it was estimated?

A. The freight was taken from our freight rate books, and the information in the freight rate books was taken from the tariffs. I do not know why the phrase "Estimated Freight" is used.

Q. I notice with reference to Exhibit 2788, Respondents' Exhibit 2788, for identification, there is also a column marked "Freight" as well as one marked "Estimated Freight." Can you say where the freight figures came from?

A. They were posted from the paid freight bills when they are returned to our office in lieu of cash.

Q. Was this freight that was entered on this Exhibit 2788, Respondents' Exhibit 2788, for identification, paid to the railroad by your customer?

A. In some cases by the customer, I believe, and in some cases by the company.

37092 Q. How do you tell which is which from that paper?

A. I do not believe I could tell from this paper.

Q. You say this exhibit, Respondents' Exhibit 2788, for identification, was made up under your direction?

A. It was made up in our sales office at the time I was district sales manager. All the clerks in the sales office worked for me.

Q. Did the sales department have charge of the ledgers of your company?

A. The sales ledgers.

Q. What was the purpose that this compilation served in your organization at that time?

A. A copy of it went to the accounting department, and a copy of it was retained in the sales department.

Q. Do you know whether or not the ledgers of your company included the item of freight?

A. This is the sales ledger. Do you mean—

Q. I am talking about the regular, the accounting department ledgers.

A. I do not know whether they do or not.

Q. Why don't you know?

A. Well, I have not looked it up.

Mr. Wooden: Now, Your Honor, I object to all these papers as being incompetent, irrelevant, and immaterial. All of them except the last one are wholly beyond the

37093 witness' knowledge. They are simply brought in here as something from the records of the company. They do not bring the man who keeps the accounts. The

witness does not know how the bookkeepers' accounts and the accounting department records are kept with regard to this, and with regard to Respondents' Exhibit 2788, for identification; that objection applies, and as to all the others it antedated the witness' connection with the company. We haven't any way of finding out what these papers mean, and they are therefore incompetent as to the witness.

37095 By Mr. Seeley:

Q. Mr. Alexander, will you please look at these papers again and tell us do these papers represent records of sales transactions of the company of which you are an officer?

37096 A. Yes.

Q. Mr. Alexander, can you tell us whether it was the regular course of your business of this company to make such writings as that at the time or within a reasonable time thereafter?

Trial Examiner Norwood: Since your connection with the company. Can you tell us that?

The Witness: Yes.

By Mr. Seeley:

Q. Will you glance at those papers again, Mr. Alexander, and tell us, if you can, whether those records to which the freight has been posted, as Mr. Wooden brought out, were the records of the accounting department, as well as of the sales department?

37097 A. A copy of the record was kept in the accounting department and a copy in the sales department. A copy went to the accounting department for their records.

By Mr. Seeley:

Q. So that the record is the same for the accounting department and sales department?

A. That is right.

Q. Now, Mr. Alexander, can you tell us whether or not the accounting department of the company use these records in crediting the customers' accounts with the freight when it was paid?

A. This is the only record they have to use.

37098 Q. And what method did the Missouri Portland Cement Company and its predecessor companies employ in invoicing cement to its customers?

A. What method did it employ?

Q. How did they invoice the cement?

A. Invoiced it at delivered prices.

Q. How long was that method used by the company?

A. According to the records, ever since the company has been in operation.

Trial Examiner Norwood: Wait a minute. According to what?

The Witness: In accordance with the company's records.

Trial Examiner Norwood: I think you had better not testify to anything about the company's records.

By Mr. Seeley:

Q. Mr. Wooden asked you concerning the column headed "Freight." Will you tell us, Mr. Alexander, has your company, or had it not, required return of freight bills by consignee when shipment was made freight collect?

A. Yes, sir; they require the return of freight bills.

Q. How long has your company made such requirement of its customers?

A. Always.

Q. Why, if you know, did your company require the return of freight bills?

37099 A. To clear the customer's account.

Q. Has the practice ever been different with respect to your company?

A. No.

Mr. Seeley: I renew the offer, Your Honor.

Trial Examiner Norwood: Let me see those. Do you not have someone else from the company that can tell us more about these records than this witness can?

Mr. Brick: I don't know; it seems hardly necessary to do that, if Your Honor please. This is the president of the company, and he has identified these papers as being the regular books and official records of this company. I do not see how there could be any better identification of those papers.

Trial Examiner Norwood: These are not tabulations, but they are the regular books?

Mr. Seeley: Exactly.

Mr. Brick: They are a part of the physical ledgers of the company, the kind of thing they refer to officially in the company with respect to any of the matters contained therein.

37101 Trial Examiner Norwood: Can this witness tell us that, as the practice of this company since he became connected with it, right on down, without going back to ancient records to tell it?

Mr. Brick: Well, I do not know anything more persuasive than ancient records, Your Honor.

Mr. Seeley: That is important. I may refer, Your Honor, if you will permit me, to the complaint, which charges that there has been a combination to sell at delivered prices, which combination has been maintained for more than eight years last past, and there have been 37102 numerous charges relating to the alleged agreement or understanding with respect to selling at delivered prices.

Mr. Wooden: He testified to that.

Trial Examiner Norwood: I do not think that documents made in the due course of business have to be identified by the person who made them. That person might be dead.

Mr. MacIntyre: If they are otherwise incompetent, irrelevant, and immaterial, yes.

Trial Examiner Norwood: Well, they appear to have some information on that point, as to what this company considered the price to be, as shown by the records that were kept.

Mr. Wooden: Your Honor, all the records that were kept—

Trial Examiner Norwood: What did you say, Mr. Wooden?

Mr. Wooden: We have here a witness who cannot tell us what these records mean. He does not know what the accounting division puts on its ledgers.

Trial Examiner Norwood: Do you mean to say you have no other witness from this company to give us this information?

Mr. Brick: We can bring in a string of bookkeepers here, each one of whom put a figure on these pa- 37103 pers, but according to the practice which has been followed in connection with other offers of that character, I do not see how that would be necessary at all.

Trial Examiner Norwood: Don't you think it would be more satisfactory if somebody who kept some of these, or made a part of them, would be here to explain how they are made?

Mr. Brick: It would be only for the purpose of satisfying the whim of Mr. Wooden. He has not questioned the authenticity of the papers. He said that.

Trial Examiner Norwood: I ask you if it would not be more reasonable.

Mr. Brick: No; I think it would be more unreasonable.

Mr. Seeley: What purpose would it serve?

Trial Examiner Norwood: I think it would be more satisfactory.

Mr. Seeley: I think we might as well throw out the federal statute if we are not going to avail ourselves of the purpose for which it was passed.

Trial Examiner Norwood: I am not sure that you have established sufficiently the fact that these are the records of the company.

Mr. Brick: We have, certainly, if Your Honor please, on the direct knowledge of the witness, as to any
37104 references which might be made to these, that they are official papers of the company.

Trial Examiner Norwood: I would like to review the record on that. We have only a few minutes left today. Can you leave this open until I rveiew the record on it?

Mr. Brick: Yes, sir. I think Your Honor might be advised also that, as far as materiality is concerned, both documentary evidence and testimony have been received on behalf of the Commission with regard to routine bookkeeping practices which covered mill nets and freight. To anyone studying these papers, they show a delivered price and freight.

Trial Examiner Norwood: Well, I will take it under consideration.

By Mr. Seeley:

Q. Mr. Anexander, does the Missouri Portland Cement Company prepay freight on its shipments today?

A. Yes, sir.

Q. How long has that been the policy of your company?

A. Oh, it has been the policy to prepay freight on all shipments since January 1st.

Trial Examiner Norwood: Of this year?

The Witness: This year.

Trial Examiner Norwood: Let us not waste any time on that.

37105 By Mr. Seeley:

Q. Well, directing your attention, then, to the period prior to July 1, 1937, Mr. Alexander, and with respect to that period will you tell us whether your company prepaid freight on any part of the shipments, and, if so, on what part?

A. We prepaid freight on a substantial part of our shipments—all shipments to the Metropolitan St. Louis area and the Metropolitan Memphis area, and other destinations at times.

Trial Examiner Norwood: Was that prior to this year?

The Witness: That is prior to January, 1937.

By Mr. Seeley:

Q. And that is true right up to January 1, 1940?

A. That is true.

Q. How about State highway departments?

A. To State highway departments.

Q. You did prepay freight on those shipments always?

A. We did.

Q. Now, as to the other part of your shipments prior to July 1, 1937, when your customers paid the freight on shipments that you made to them, what was your intention: Was the freight paid for account of your company or for account of the consignee?

A. On account of our company.

Q. And how long was that true?

A. It has always been the practice.

37106 Mr. Wooden: Your Honor, I thought we had an understanding this afternoon that that point was conceded, I believe, by Respondents, that the freight had been paid to the account——

Trial Examiner Norwood: I think we have covered that. It is just wasting time.

Go ahead.

Mr. Wooden: He has gone over it again and again.

Trial Examiner Norwood: This Counsel was not present when the statement was made.

Mr. Brick: I do not know whether there is a misunderstanding here or not. May I have Mr. Wooden's comments read back, please?

Trial Examiner Norwood: Read Mr. Wooden's statement.

(Statement of Mr. Wooden was read.)

Mr. Wooden: What I mean is the point that the rail-

road companies make no accounting to shippers of cement for freight paid for their account by the customer.

Mr. Seeley: What of that, Your Honor? They can concede that the moon is black, but what bearing has that?

Mr. Wooden: We do not concede it. You did.

Trial Examiner Norwood: The concession was made by counsel for the Respondents.

37112 Washington, D. C.,
April 23, 1940.

37114 Trial Examiner Norwood: Now, Mr. Withrow is not here but we might as well dispose of those motions.

Regarding the motion appearing on pages 37082, to reverse my ruling appearing on page 36080, lines 13 to 25, this is asked because of the terms of a stipulation providing for a ruling on motion to strike being made prior to the discharge of the witness, but the counsel making the motion acquiesced in the postponement of the ruling. He seemed perfectly willing for me to defer it until I could study the record, and especially request that the record show the discharge of the witness coming as it did immediately after my proposal to postpone the ruling (see record page 36077-36078), indicates that my action was with his knowledge and consent.

37115 At any rate, the motion is denied.

As to the record, page 37085, that I had reversed myself, counsel indicates that my ruling on pages 36080 and 36081 is a reversal of the ruling made on page 35944, and following.

I think the record will show that the first ruling was made with the understanding that the motion might be renewed after cross-examination. The term "reversing myself" is hardly accurate there.

As to the motion on page 37083 to 37085, reversing my ruling shown on page 36081 striking lines 1 to 12 on page 36077 for lack of a motion appearing on this record, that is not urged under any stipulation, and it is the same kind of matter which I struck in the stipulation.

Now, I fully understood that that was included in the Government's motion, and with that in mind I cut him off here as you will see at the bottom of page 36077.

Now, if you will refer to page 36076 and read down, you will see that the answer commencing on line 25 is not a response to the question, and it is more or less a voluntary statement by the witness there which I think should not be allowed to stand in the record.

The same thing can be said of this next answer there regardless of any technical objections.

So I shall deny that motion, so that the matter
37116 appearing at page 36077, lines 1 to 12, are stricken.

37118 It is hereby stipulated and agreed that the witness M. Moss Alexander, president of the Missouri Portland Cement Company, shall be deemed to have given direct testimony in this proceeding (subject to the same conditions agreed on with respect to the stipulated testimony of Charles Horner heretofore appearing in the record), as follows:

Method of obtaining information as to competitive prices:

The Missouri Portland Cement Company attempts to determine what prices its competitors are currently quoting at destinations where it is seeking business. It has always been the practice of the Missouri Portland Cement Company to keep currently advised of the prices quoted by competitors who are selling cement in the markets where it is doing business and of the prices being paid by purchasers of cement in its market territory.

The Missouri Portland Cement Company obtains its information concerning prices of its competitors by means of information picked up in the field. Its salesmen are instructed to find out what prices are being charged as well as what prices are being quoted for cement by competitors, and to report immediately to the home office any change in competitive prices or practices they find or hear of in the field and to pick up and send in actual quotations or announcements of competitors wherever possi-
37119 ble. These instructions, to witness' knowledge, have been carried out.

The Missouri Portland Cement Company's salesmen are visiting prospective customers and selling or trying to sell cement constantly. The company also secures such information directly from its friendly dealers, of whom it has about one thousand active accounts, and from other customers by way of telephone calls, letters, and competitors' quotations which they send in to it. Other sources

of information as to prices of competitors are tabulations of bids which have been submitted to State and federal governmental agencies. Other than these sources, the Missouri Portland Cement Company has no source of information concerning competitive prices.

Through the above sources, the Missouri Portland Cement Company obtains information as to competitive price changes almost as soon as competitive quotations are in the hands of the trade. It takes very little time for the Missouri Portland Cement Company to get news of changes in competitive prices or policies. In most markets such information is obtained almost as soon as the competitive announcements are in the hands of the consuming trade. In all cases, the lapse of time is very short, and it is seldom more than a day before the Missouri is fully apprised of competitive changes through the information which its salesmen are able to obtain in the field. Immediately upon learning of a price change at any point in its marketing area, the company gets in
37120 touch with its salesmen and as many of its dealer customers as it can in order to ascertain how extensive the price change is.

The Missouri Portland Cement Company takes the new prices which it learns of and deducts the freight rates from all mills competing in its marketing territory to the destinations involved in order to determine whether they reflect a mill base at some producing mill. When the company has satisfied itself that there has been a price change in any part of its marketing territory, it does not check competitive prices at every destination in the area before sending out its own quotations. Having satisfied itself as to the nature of the change, if the new prices are lower than prices it has been quoting, it meets them immediately or foregoes the business. If the new prices are higher, it decides whether or not it will follow them and acts accordingly.

Method of price quotation:

It is the practice of the Missouri Portland Cement Company to send out price quotations to its customers at the time of changes in its prices. The company issues quotations for all points at which it does business or has any likelihood of doing business, and sends them to all of its regular dealers and to most of the dealers to whom it is endeavoring to sell.

The Missouri Portland Cement Company has found building material dealers and contractors to be well informed as to the delivered prices quoted on cement.

37121 It finds that purchasers compare the prices quoted by the various cement companies and keep in touch with the various sources of supply. It also finds that it is the practice of contractors to make inquiries of competitors to make sure that they obtain the lowest price quoted in any given market. In the company's experience it has found that dealers and contractors are not willing to pay more for Missouri cement than for a competitor's brand. From the company's experience in selling cement, it has found that it cannot sell cement for more than its competitors and it has also found that it cannot afford to permit any competitor to sell cement in any market at a price less than that quoted by Missouri, or else Missouri will be eliminated from that market.

In the event of a decline in prices Missouri has found that some of its regular dealer and contractor customers give it an opportunity to meet the lower prices quoted by competitors.

The Missouri Portland Cement Company does not ordinarily attempt to quote below the lowest prices it finds. It has been the experience of the company that, while it might put a car or two into the market before its competitors discover its lower prices, its competitors meet the lower prices immediately upon learning of them. Consequently, the temporary advantage that might be gained by the company is lost and it must henceforth sell its cement at the lower price.

37122 In some marketing areas, the Missouri Portland Cement Company has quoted delivered prices by adding to its mill base figure the freight from its mill to the destination points involved. In arriving at its delivered prices for the various destinations where it sells cement, Missouri has found that the market price at many points usually reflects a mill base at some basing mill. The Missouri Company, however, quotes the lowest quoted price at each point where it sells cement, regardless of whether or not the delivered price appears to reflect a base.

The Missouri Portland Cement Company is and has been free at all times, subject to general competitive conditions it finds in the field, to decide whether it will have a so-called mill base at its plant and the amount of such

mill base. The Missouri Portland Cement Company has no assurance that the prices it is currently quoting will be the lowest prices quoted at the destinations where it is seeking business, nor does it have any foreknowledge of which mills are so-called basing mills or of what the so-called mill base may be at any particular mill. It has been the experience of the company that there is no limit to the number of mills that may be so-called basing mills at any particular moment. There is no particular territory that reflects the same mill base at the same mill at all times. It has been the experience of the company that
prices at any given point reflect a mill base at one
37123 mill at one time, and at another mill at other times
and sometimes reflect no mill base at all. None of the prices it has ever found in its marketing territory have reflected a mill base at a non-producing point nor has it ever used a non-producing point as a mill base.

The company has never had any understanding or agreement with any of its competitors with regard to the establishment or maintenance of any mill as a basing mill, or with regard to the amount of the mill base at any particular mill, or with regard to the prices it will charge for its cement. It has never received information as to prices or mill bases in the form of lists or otherwise from any of its competitors, and has never sent such information to any of its competitors. The company has never published any list of mill bases.

Organization of the Missouri Portland Cement Company:

The Missouri Portland Cement Company was organized on April 7, 1900, under the laws of the State of Missouri. It was organized at that time under the name of the New Union Sand Company as a sand and gravel producer. In February, 1907, the New Union Sand Company purchased the Prospect Hill property of St. Louis Portland Cement Company, St. Louis County, Missouri, and in November, 1908, it purchased the Sugar Creek property of Kansas City Portland Cement Company, Jackson County, Missouri. Both of these plant properties were opera-
37124 tive at the time of purchase. In June, 1917, the
name of the New Union Sand Company was changed to the Missouri Portland Cement Company.

The general offices and principal place of business of Missouri Portland Cement Company are located at St.

Louis, Mo. The company maintains sales office at St. Louis, Mo., Kansas City, Mo., and Memphis, Tenn.

The company owns and operates two cement plants at the present time, one at Prospect Hill, St. Louis County, Missouri, and the other at Sugar Creek, Jackson County, Missouri, being the same plants which were purchased in 1907 and 1908, respectively. The Missouri Portland Cement Company does not operate any silos or warehouses.

The Missouri Portland Cement Company is not a parent or subsidiary of any other cement producing or selling company nor is it affiliated in any way with any other cement producing or selling company.

Marketing area of the Missouri Portland Cement Company:

The Missouri Portland Cement Company normally makes shipments of Portland Cement into the States of Missouri, Kansas, Illinois, and into some parts of the States of Iowa, Nebraska, Oklahoma, Arkansas, Mississippi, Tennessee, Kentucky, and Indiana.

In the area in which the Missouri Portland Ce-
37125 ment Company normally does business, it finds many cement companies soliciting business and shipping cement. These competitors include many so-called small companies, as well as several so-called large companies. The Missouri Portland Cement Company is generally known in the trade as a small company in the territory in which it does business.

In competing for business in any one market, the Missouri Portland Cement Company normally finds itself in competition with at least ten other competitors. Generally, it finds as many competitors competing for carload lot sales as it does for larger orders. The cement companies which solicit business in various parts or in all of the marketing area of the Missouri Portland Cement Company are as follows:

Lehigh Portland Cement Company
Lone Star Cement Corporation
Universal Atlas Cement Company
Alpha Portland Cement Company
Marquette Cement Manufacturing Corporation
Dewey Portland Cement Company
Hawkeye Portland Cement Company
Penn-Dixie Cement Corporation
Ash Grove Lime & Portland Cement Company

Nebraska Cement Company
Monarch Cement Company
Consolidated Cement Corporation
37126 Oklahoma Portland Cement Company
Arkansas Portland Cement Company
Signal Mountain Portland Cement Company
Hermitage Portland Cement Company
Louisville Cement Company
Kosmos Portland Cement Company
National Cement Company

The Missouri Portland Cement Company travels salesmen in all of the States which are a part of its normal marketing area. It has at the present time a sales force of thirty men. Since the witness has been with the company, it has increased its sales force gradually, and its sales force is now approximately 25 percent larger than it was when the witness came with the company. The company has increased its sales force in order to secure a more satisfactory volume of business. The witness found that its competitors were employing additional salesmen, which made it necessary for the company to employ additional salesmen or lose business.

The area in which the Missouri Portland Cement Company solicits business fluctuates, depending upon prices current, the shifting of consumption, and the ability of the company to give the service which will permit it to secure the business. There is no fixed area to which the company confines its solicitation.

Since the witness has been with the company,
37127 there have been changes in the marketing area. For instance, during 1932 and 1933, the Missouri Portland Cement Company gradually abandoned solicitation of business in the States of Iowa, Nebraska, Oklahoma, Mississippi, Kentucky, and Indiana. The reason for doing so was that consumption in those territories was declining substantially and business at the prices current was unattractive. Subsequently, the Missouri Portland Cement Company resumed solicitation of business in those territories because it found that cement consumption was increasing and prices current were more satisfactory than they were at the time it abandoned solicitation in those areas.

Imported cement:

The Missouri Portland Cement Company has never come into competition with imported cement. The company does not sell in any market where imported cement is sold, and it has never competed with any other domestic mill, to witness' knowledge, that does come into competition with imported cement.

The Missouri Portland Cement Company has never concerned itself in any way with imported cement, and has never taken any measures with respect to the competition of imported cement. Witness knows of no dealers, or prospective dealers, of the Missouri Portland Cement Company who have ever traded in imported cement.

The Missouri Portland Cement Company has never been
37128 a party to any agreement or understanding regarding imported cement.

Land grant rates and control clause:

Prior to 1937, the Missouri Portland Cement Company has on occasions bid on requirements of the United States Government where land grant rates were involved in the transportation of the cement. In bidding on such requirements, it has always been the policy of the Missouri Portland Cement Company to endeavor to quote prices that would give the Government as low a cost at destination as the lowest cost at destination that it anticipates would be quoted by any of its competitors. This has always been true whether the land grant rates involved were rates from one of the mills of the Missouri Portland Cement Company or from a mill of some one of its competitors. In the ten years since witness has been with the Missouri Portland Cement Company, the total amount of cement which it has sold to the Federal Government, including shipments which did not involve any land-grant rates, has amounted to less than three-fourths of one percent of its total sales for the same years.

The Missouri Portland Cement Company has always secured information as to the land grant rates involved in particular lettings from railroads and from official tabulations of bids taken by the Federal Government for delivery of cement at the same points. This information has
been used by the company when it had occasion to
37129 quote the Federal Government subsequently. The Missouri Company has never filed with or requested

any land-grant rate information from The Cement Institute.

In 1934, after it had been notified by the Code Authority of the Portland cement industry of a so-called "control clause" which had been filed by a member of the industry, the Missouri Portland Cement Company used the "control clause" in connection with some of its bids to the Federal Government where land grant rates were involved. The Missouri Portland Cement Company has never discussed the so-called "control clause" with any of its competitors, nor has it ever considered itself obligated to anyone to employ the "control clause" or any particular method of quoting to the Federal Government. The Missouri Portland Cement Company has always endeavored to give the Federal Government the benefit of any land grant rates or special rates that were available in any part of its sales territory.

The Missouri Portland Cement Company has never requested or secured any land grant rate information from any of its competitors, nor has it ever known in advance what rates its competitors would use in making quotations to the United States Government. None of the officials of the Missouri Portland Company have ever discussed or conferred with any competitors with reference to its policy or any other company's policy regarding land grant rates.

37130 Trucking:

The Missouri Portland Cement Company has, at times, sold cement to customers for truck delivery. Such sales made by the Missouri Portland Cement Company were always a negligible part of its business. During short periods in 1930, 1931, and 1932, in connection with a local road building program in the immediate vicinity of one of its plants, there was some temporary increase in its sales for truck delivery. For that period the sales made for truck delivery in relation to its total sales, were as follows:

Year	Ratio of Truck Shipments to Total Shipments
1930	4.3%
1931	3.9
1932	5.8
1933	0.9

The Missouri Portland Cement Company received complaints from many of its dealer customers about its policy of selling in truckload lots. Its dealers complained that the company's policy of selling in less-than-carload lots was a policy which tended to place the company in the retail business in direct competition with many of its customers. These complaints became increasingly frequent, and, finally, it decided to, and did, discontinue sales in truckload quantities.

37131 The policies of the Missouri Portland Cement Company in regard to the sale of cement in truckload quantities have been arrived at and adopted individually and independently and have been based entirely on considerations of what was to the best interest of the Missouri Portland Cement Company.

The Missouri Portland Cement Company has never had any understanding or agreement with any of its customers in regard to trucking of cement. The Missouri Portland Cement Company has never had any agreement or understanding with any competitors or dealers or railroads, or with anyone else, in regard to the discontinuance of trucking. The Missouri Company has never had any contact or correspondence with railroads or with any dealer associations or clubs in regard to trucking.

Prior to 1934, the Missouri Portland Cement Company did not make shipments by water from either of its plants. Although there was no customer demand for water delivery at either of the plants of the company, the Missouri Portland Cement Company observed that some of its competitors were obtaining some business in a part of its sales territory by offering facilities for barge delivery. In 1934, with a view toward securing this business for itself, the Missouri Company constructed six barges of a capacity of 2,500 barrels each, for use in shipping cement pro-

37132 duced at its Prespect Hill plant.

The Sugar Creek plant of the Missouri Portland Cement Company is located on the Missouri River, but conditions of the river channel are such that it is nonnavigable for commercial transportation. For this reason our company has never been able to avail itself of the use of water as a means of transportation of cement at its plant at Sugar Creek, Mo.

Since the company's Prospect Hill plant is not so located that barges may be loaded at the plant, it is neces-

sary, where water delivery is desired, to load cement on railroad cars at the plant and transport it by rail several miles to a transfer station on the Mississippi River. At the transfer station, the cement is unloaded from the cars and loaded into barges.

Since 1934, the Missouri Portland Cement Company has shipped cement produced at its Prospect Hill plant, partially by water, on a few specific jobs. Shipments by this means, in relation to the total shipments made by the company since the institution of its service has been as follows:

Year	Rate of shipments by barge to total shipments
1934	7.3%
1935	2.1%
1936	1.1%
1937	2.0%

37133 It has been the policy of the Missouri Portland Cement Company to deliver by water to any customer who requests water delivery. It has never refused to ship by water to any customer who desired it and it has been ready to ship, and has shipped, less than full barge load quantities to customers who desired it.

The Missouri Company has found that it generally effects no saving by utilizing water delivery in distributing its cement. The cost of handling the cement in unloading cars at the transfer stations and loading the barges, together with the large investment in and the maintenance cost of the barges which it keeps available for shipments, is such that the cost of barge delivery generally exceeds the transportation cost by all-rail delivery.

The Missouri Portland Cement Company has never had any agreement with any of its competitors regarding the form or method of transportation it uses in distributing its cement.

Diversion in transit:

It is, and has always been, the policy of the Missouri Portland Cement Company to oppose diversions of its cement in transit. The reason for that policy is the desire to retain the good will of its dealer customers. The Missouri Portland Cement Company has often found that where a diversion has taken place, the diverted ship-

ment turned up at a destination where the company
37134 had an established dealer customer, and that that dealer complained to the company about it.

The Missouri Portland Cement Company has always regarded diversions of its shipments in transit as a fraud upon the company and a deceitful attempt to deprive it of the price for which it was selling its cement to its other customers at the destination to which the cement was diverted.

The Missouri Portland Cement Company has never experienced any appreciable trouble with diversions of shipments of its cement in transit, and the company has never concerned itself with whether or not the cement of other companies was being diverted. Witness has never had any discussions with any of his competitors as to the policy of this company toward diversions in transit. The Missouri Company has never had any agreements with any of its competitors with respect to its policy toward diversions of shipments in transit.

Importance of the dealer:

Since about 80 percent of its annual sales are made to dealers, the Missouri Portland Cement Company considers its dealers to be the primary outlet for the distribution of its cement.

37135 Mr. Wooden: Now, there is one part of the stipulation to which I want to make a special objection, that being under the subject of water delivery and applies to the paragraph next to the last under that subject.

The special objection is made to that paragraph.

A special motion to strike is made on the ground that it is irrelevant and immaterial and is irrelevant particularly under the rulings of Your Honor in the past to the effect that the costs of Respondent Companies are not relevant to the issues, and this paragraph has to do with the costs of Respondent's Company with regard to delivery in its own barges by water.

37136 Trial Examiner Norwood: Well, isn't there some proof or allegation that Respondents refused to avail themselves of cheaper water transportation?

Mr. Wooden: Your Honor, I will move further to strike—to make my point still clearer, object and move to strike because it make no difference and it is irrelevant, therefore unless it is reflected in the delivered price, and

there is no showing in the stipulation or yet by the witness that they make any differences in the delivered price because of using barges. It is figured on a rail basis according to all the testimony we have heretofore had, but, on the other part, it is a question of not whether they use barge and water transportation, but whether the public gets any benefit from it, and I would say that if sold, or quoted on a delivered price basis figured on rail, that question cannot enter into the situation, and it is also a question not merely between the costs of owned barges, but a cost compared between rail rates and water rates by common carriers both water and rail.

37146 Trial Examiner Norwood: With respect to the motion to strike all the matter in this stipulation appearing under the title "Water Delivery," that was the motion?

Mr. Wooden: Just one paragraph of that, Your Honor, that my motion was specificially directed to.

37147 Mr. Wooden: Where I object to his cost of shipment by its own barges.

37148 Trial Examiner Norwood: Well, I shall entertain a motion with regard to other exhibits, but I think that I shall allow the motion to strike the entire subject there as irrelevant and immaterial, as denying something that has not been alleged or covered in any way by testimony that these Respondents have to meet. This is just bringing up something and denying it that has not been charged, taking a great deal of time with that process, but I strike that paragraph, anyway.

37149 M. MOSS ALEXANDER thereupon resumed the stand and testified further as follows:

Direct Examination. (Continued).

Trial Examiner Norwood: Proceed with the examination.

37150 The witness identified Resp. Ex. 2789-I to M as Missouri invoices to customers covering shipments for the months of February, March and April, 1929, made in the regular course of business; Resp. Ex. 2790 and 2791 as Missouri copies of sales ledger sheets made during August, 1930.

37151. *Examination on Voir Dire.*

By Mr. Wooden:

Q. Referring, Mr. Alexander, to Respondents' Exhibits 2790 and 2791, for identification. As I understand it those are in the same form as respondents' Exhibit 2788, and made up in the same way and for the same purposes?—

A. Yes, sir.

Q. —as Respondents' Exhibit 2788?

A. Yes.

Q. They are transmitted—the duplicates of those records are transmitted to the auditors or accounting division?

A. A carbon copy.

Q. Do you know what the auditor or the accounting division puts on the ledgers showing the accounts with the different companies?

A. Once a month.

Q. The different purchasers.

A. Once a month they debit accounts receivable with and charge sales with, from this information.

Q. Do you know whether the auditing division or
37152 the accounting division, or department, enters on the accounting ledgers of the company the delivered prices or the freight?

A. They make an entry and break it down into delivered prices, freight discount, and net.

Q. Why is it that you could not tell me that Friday, whether they entered the freight on the ledgers of the accounting department?

A. I made an investigation. I talked to our accounting manager and asked him.

Q. And is it your testimony that that was being done in 1930, at the time these sheets were made up?

A. I asked him about that.

Q. And what is your information?

A. He told me it was.

Q. In other words, you are testifying now that the ledgers of the accounting department of your company show for each of your companies' customers the amount of the freight and the delivered price made on sales and shipments to each customer?

A. You misunderstood me, Mr. Wooden. I said trans-

fers are made once a month, and the totals are posted to the general ledger for the month, tabulated.

Q. Well, are you now testifying that the ledgers in your accounting department show for each month—I am talking about the auditor's ledgers—

37153 Q. —show for each month, as to each customer the total of the delivered price on all shipments and sales to that customer during that month?

A. I did not testify that they were made up individually. I testified that they were made up in totals once a month.

By Mr. Wooden:

Q. For each customer?

A. I did not say for each customer.

37154 Q. I am trying to find out what the meaning of your testimony is.

A. I said the total of the month's shipments.

Q. For all customers?

A. That is right.

Q. And the total for customers, the total on delivered prices for shipments to all customers is the total on the ledgers of the auditing department each month; is that right?

A. Tabulated as I testified.

Q. The total of delivered prices?

A. Yes, sir.

Q. And is the total of the freight also shown?

A. Yes.

Q. And is the total of the net also shown?

A. Yes.

Q. Those three things are shown?

A. Yes, and discount.

Q. Well, the discount, and you get your net after that?

A. Yes.

Mr. Wooden: The documents are objected to, Your Honor, as incompetent, irrelevant, and immaterial, as not being the witness not being competent to testify except by hearsay as to the methods followed in the accounting department.

37155 (RESP. EX. 2788, 2790, and 2791, were offered and received in evidence.)

37156 By Mr. Wooden:

Q. Referring, Mr. Alexander, to Respondents'

Exhibit 2789-A to M, inclusive, what use does your accounting or auditing division make of invoices in keeping their records?

A. They make no use of it.

37157 (RESP. EX. 2789-A to 2789-M was offered and received in evidence.)

By Mr. Seeley:

Q. Mr. Alexander, has the Cement Institute ever made any recommendation to your company regarding what form of invoice it should use or what form of sales contract it should use?

A. They have not.

Q. Mr. Alexander, did your company furnish any invoices to the Federal Trade Commission since the beginning of this case?

A. We have.

Q. And I show you Commission's Exhibits 2726, 1 to 102, and ask you if those are the invoices which

37158 your company furnished to the Federal Trade Commission.

A. These consist of invoices for the month of April, 1938, and are the invoices furnished.

Q. You told us the other day, Mr. Alexander, about the practice of your company with respect to prepayment of freight on shipments made to its customers. Will you look at those invoices again, please, and glance through them and tell us on how many of those shipments you prepaid the freight?

(There is a pause while the witness does as requested.)

A. I count 59 here on which we paid the freight.

Q. Out of 102, you say, is that the count?

A. 102.

The witness identified Resp. Ex. 2792-A to Z-2 as copies of Missouri's invoices to customers for a period in September, 1931. The invoices cover a period from April 1929 to April 1937 and the territories of Missouri, Illinois and Arkansas. Missouri prepaid freight on all these shipments. These invoices are typical of Missouri's shipments generally in respect of prepayment of freight into those territories.

37159 Mr. Seeley: I offer Respondents' Exhibits for identification, 2792-A to Z-2, consisting 28 pages, in evidence. (Handing same to Wooden.)

Mr. Wooden: May I ask a question on voir dire?

Trial Examiner Norwood: Yes.

Examination on Voir Dire.

By Mr. Wooden:

Q. Referring to these invoices about which Mr. Seeley was just asking you, those are all prepaid stations, are they not?

A. There is nothing on the invoice to indicate whether they were prepaid stations or not, and I cannot remember.

Mr. Wooden.

Q. Is that what you mean by your answer to Mr. Seeley's last question, that these were typical? Did you mean that they were typical of all invoices, so all
37160 are prepaid station invoices?

A. I did not say anything about prepaid stations.

Q. They are not typical of all invoices, are they?

A. They are typical of prepaid invoices.

Q. Look over the destinations there on those invoices, and what would you say, based upon your general knowledge of the business, that those are prepaid stations shown on there, where the railroad requires prepayment of the freight?

A. My attenton is attracted to Webster Groves, Missouri. That is a town of some 10,000 people. I do not believe that would be a prepaid station.

Q. Isn't that in the St. Louis switching district?

A. No. Belleville, Illinois—

The Witness: One for Belleville, Illinois, Alton, Illinois. Those are good sized towns.

37161 By Mr. Wooden:

Q. Well, do you mean to say that prepayment was not required in those cases?

A. Not required, no.

Q. How do you know it?

A. Because we made a practice of prepaying to our customers who wanted it.

Q. Wherever they wanted it?

A. Where it was agreeable between ourselves and the customer.

Q. Well, do you always agree whenever your customer wanted it?

A. I do not think we always agreed.

Q. As a matter of fact, your general practice was not to prepay unless required, wasn't it?

A. Our general policy was not to prepay. We would prepay to many stations on a substantial part of our business.

Q. What percentage of your business did you prepay freight on?

A. I think approximately 50 per cent, Mr. Wooden.

Q. Over a long period of time?

37162 A. I think so.

Q. Going back as far as 1930?

A. Yes, I think so.

Q. And without any maferal change since that?

A. Well, without a substantial change. It may have increased some time during the years, toward prepayment.

Q. You do not mean to say that 50 per cent of all the shipments that you made to your customers were prepaid?

A. Yes, that is what I mean to say, approximately.

Q. You did not mean to confine it to tonnage?

A. No, I meant to refer to cars shipped.

By Mr. Wooden:

Q. Well, isn't that tonnage, cars shipped?

A. They vary in size, Mr. Wooden.

37163 Q. Yes, I know, but you have already testified that your shipments into St. Louis switching district were prepaid. That is a heavy part of your tonnage, isn't it?

A. That is a part of our tonnage.

Q. A substantial part, isn't it?

A. Yes, it is a substantial part.

Q. Do you mean to say that prior to this year, and say since 1930 down to the end of last year, that as much as 50 per cent of your customers had the freight prepaid?

A. I think so.

Q. Fifty per cent of the number of your customers?

A. I believe so.

Q. All right. I just wanted to get it clear.

37164 (RESP. EX. 2792-A to 2792-Z-2 were offered and received in evidence.)

37165 *Direct Examination (Continued) by Mr. Seeley.*

Q. Mr. Alexander, has the practice of your company which you told us about, namely, the practice of requiring your customers to return freight bills, had anything to do with what your competitors were doing?

A. No.

Q. Now, just one question. I want to ask you whether to your knowledge there has been any change in the accounting method or practices of your company since you have been with the company?

A. No.

37167 Q. You told us, Mr. Alexander, that your company quotes prices on its cement, quotes destination prices on its cement.

Now, apart from the historical aspect which you told us about; namely, that it has always been the practice of your company since it has been in business. Will you tell us why your company now quotes destination prices?

A. Because our customers request destination prices.

Q. Considering only your own experience in selling cement, Mr. Alexander, will you tell us what you have found with respect to where you have market—what you have found your market to be, and where?

A. We have found our market to be the point of use of the cement.

37168 Q. Has the Missouri Portland Cement Company ever had any agreement or understanding to sell at destination prices?

A. We have not.

The witness identified Resp. Ex. 2793-A to L as price inquires from Missouri's customers received in the regular course of its business.

Q. Did you quote prices in response to these requests?

A. Yes.

Q. Mr. Alexander, prior to the issuance of the complaint in this proceeding, did you have any discussions or conversations with any of your customers concerning your policy of selling, quoting prices at destination?

37169 A. Yes.

Q. Under what circumstances did you have those conversations?

A. After Governor Horner, of Illinois, criticized delivered prices shortly after he was elected, I began to

ask certain important customers as I would have an opportunity to visit with them, if they would be interested in quotations on cement f.o.b. our plant.

Trial Examiner Norwood: Now, you have some papers there to offer, letters from dealers, and you are bringing out testimony here to show dealer reaction to this custom or to this method of quoting delivered prices. Now, I do not think that we need to spend any more time on that. The subject has been completely covered.

Mr. Seeley: I do not intend to pursue it further than to ask one more question, Your Honor.

By Mr. Seeley:

Q. What did your dealers tell you?

Mr. Wooden: Just a minute.

37170 If Your Honor please, that is objected to as calling obviously for hearsay, and therefore it is objectionable.

Trial Examiner Norwood: I think we have covered it. It is cumulative, and it is a waste of time.

Mr. Brick: I think Your Honor is correct in suggesting that it might be to some extent cumulative.

Trial Examiner Norwood: I think in view of counsel's admission this morning with respect to this witness, it should be excluded.

Mr. Brick: This is quite different, Your Honor. What we propose showing through this witness is that after Governor Horner made some public statements concerning delivered prices on cement, that he interrogated some of his important customers to find out whether they would be interested in having f.o.b. mill prices.

Now, he has not yet been able to give us the results of those inquiries, and I think it is quite necessary, and it is different from other evidence of other witnesses on the point in that this goes to a matter of making direct inquiries while there is criticism in the public press about the matter; and the other references by witnesses to contacts with customers on the matter were more or less casual.

This is quite different, and I think is much more important and is very reliable from that standpoint be-

37171 cause of the circumstances I mentioned.

Trial Examiner Norwood: Well, the objection is sustained.

Mr. Seeley: I offer to prove, Your Honor, that the witness representing the Missouri Portland Cement Company, a Respondent in this proceeding, had occasion in the regular course of business, prior to the institution of this proceeding, to consult its customers concerning its policy of quoting prices, and that it did consult them, and that it did ascertain what the attitude and inclinations of those customers were, and that on the basis of that information and other information which it had in the regular course of business it has continued to follow the practices which have been the practices of this company ever since it has been operating with respect to its method of quoting cement; and that I offer to show further that this witness ascertained that with respect to its customers that both its dealer as well as its contractor customers were approached in this matter and notified this witness as to their desires and stated that they wanted to know what cement would cost them at destination, and were not interested in quotations f.ob. plant.

I offer to show that this witness does not sell at the mill to these customers because it has found that the
37172 market is not at its mill, and that those customers are not interested in buying cement f.o.b. plant, and that those customers represent the great bulk of its business.

The witness identified Resp. Ex. 2793-A to L as typical of the inquiries which Missouri had received from customers both before and subsequent to the date of the complaint in this proceeding.

Mr. Seeley: Now, before offering these papers, I ask if Your Honor will rule on my prior offer of proof with respect to the oral examination which I propose to go into?

Trial Examiner Norwood: Well, I shall reject it and give you the benefit of your exception.

37173 Trial Examiner Norwood: Well, I shall exclude it, and I am satisfied that it will not prejudice the Respondents in any way.

37174 By Mr. Seeley:

Q. And your previous answer as to the typical nature of these papers applies to State highway departments and other governmental customers, other State departments as well as the other customers?

37175 A. Yes.

The capacity of our plant at Prospect Hill, St. Louis County, Missouri, is approximately 3,250,000 barrels; and the capacity of our plant at Sugar Creek, Jackson County, Missouri, is approximately 1,250,000 barrels. These figures are based upon our experience as to what we can produce. Under most favorable conditions we could probably produce annually that amount of ce-
37176 ment today. I am speaking now of Standard Port-
37177 land cement. The plant at Prospect Hill was changed from a dry plant to a wet plant in 1924. New kilns were put in at that time which slightly increased the capacity, the exact amount I do not know. In 1928 an additional kiln was added at Prospect Hill for the purpose of making high early strength cement. The Sugar Creek new kilns were put in to replace old kilns in 1930, and that may have had the effect of slightly increasing the capacity at that plant. At the period that I have specified when these capacities of these mills were changed, I was in the cement business and was familiar with cement consumption. The cement consumption was rapidly increasing in that territory during the time those changes were made.

37178 Mr. Wooden: Your Honor, I offered this last week to stipulate that every increase in productive capacity by the industry or by any company was made with the expectation that they could dispose of their output, and, of course, demand varies from time to time, and it increased at certain times.

Trial Examiner Norwood: Well, he is trying to show that this resulted from changed conditions, or an increase of demand. Was that not your objective there?

Mr. Seeley: We are showing that whatever action this company took with respect to its capacity it took as the result of natural economic evolution as the result of business conditions.

Trial Examiner Norwood: Now, here again you show that without showing just how they made their increases, the mechanical process of making the increases, why can't you go to the point there?

Mr. Seeley: I am going into the kiln, whether they added a kiln, or whether they introduced a new piece of machinery. I have not gone into that. I am going into the question of the effect which impinged on the market

as the result of the action that they took, the relation of this company, and the available demand was changed as a result of this action which they took.

37179 Mr. Wooden: Your Honor, I am going to admit what is a matter of common knowledge, and of which judicial notice might be taken, that during the 1920's up to 1929, that almost all the industries, including the cement, showed increasing, sharply increasing demands for their products.

37181 We have made changes in our plants since I have
37182 been affiliated with the company in order to produce high early strength cement and in order to produce other types of cement, such as modified, and type B, and masonry cement. We have made an investment of something over two and one-half million dollars in new equipment since I have been with the company to improve the quality and expand our facilities to make the various types of cement.

Q. Were you aware, Mr. Alexander, that Mr. Mallory estimated the capacity of your plants?

A. I believe it came to my attention that he had made some estimate of capacities during the Code period.

37183 Q. Has the Missouri Portland Cement Company ever had any agreement or understanding as to the amount of clinker or of cement that you would or would not produce at either of your plants?

A. No.

37184 Q. Did you ever consult with Mr. Mallory at any time about the capacity of the plants of the Missouri Portland Cement Company?

A. I have not.

Q. Or about the capacity of any of the plants of competitors of the Missouri Portland Cement Company?

A. I have not.

Q. Did your company ever furnish The Cement Institute with any information on the capacity of your plants?

A. No.

Q. Tell me briefly, is there, or has there ever been a secret about the capacity of your plants?

A. Not to my knowledge; no secret.

I determine the rate of operation of the cement plants of the Missouri Portland Cement Company. We
37185 plan our operations in advance subject to change. At our Prospect Hill plant, I think, with the excep-

tion of four months, we have operated continuously at part capacity for six consecutive years. At our Sugar Creek plant, we have not been able to operate over 8 or 9 months a year during the last 6 or 7 years.

In preparing our operations, we take into account the amount of unshipped business on our books. We give consideration to the general construction activity in our territory. In that connection it is very important for us to know whether or not the contractors on our books are genuine.

Q. In planning your operations do you, or have you since you have been with the company, ever
37186 taken into account any capacity figures? Do you pay any attention to the capacity figures?

A. We only pay attention to the probable sales, probable demand.

Q. Then, your answer is "No"?

A. No.

The storage capacity at our Prospect Hill plant is approximately 450,000 barrels; and at our Sugar Creek plant it is approximately 225,000 barrels. The storage capacity at the Prospect Hill plant was increased 100,000 barrels in 1928 and some old storage was modernized in 1935, approximately 150,000 barrels; and at Sugar Creek 125,000 barrels was added in 1937. The latter part of my answer applied to the period since I have been
37187 with the company. The reasons for the latter increase as I have described were the increasing types of cement which we were making and (a) desire to level out operations to stabilize our employment situation. It is necessary to take into account storage capacity in planning operations.

37192 Q. Do you or do you not recall attending a meeting of the industry during the Code period at which that plan was discussed?

Mr. Wooden: Your Honor, I want to direct attention to the fact that I have long since stated on the record that there would be no contention made that the plan of allocation of business proposed under N.R.A. went into effect.

37193 Q. And, to your knowledge, has there ever been any agreement among any cement manufacturers of competitors, that they should or should not ship into each other's territory?

A. Never heard of any such agreement.

Q. Now, having in mind your entire experience, not limiting yourself to this particular plan, or to the period during which this plan was under consideration, has your company ever had any arrangement for sharing the business in any of its sales territory?

A. We have not.

37195 Q. Well, have you or have you not found consumption of cement uniform throughout your sales territory?

A. Most uniform.

Q. Do I understand that the consumption in

37196 your sales territory you found to fluctuate?

A. Very substantially.

Q. Under your company's present method of selling your cement, have you or have you not concentrated your solicitation where the current consumption of cement is good?

A. We have.

Mr. Wooden: Just a moment, Your Honor.

I want to offer now to stipulate that the demand in the territory of every mill in the industry has been a fluctuating demand, that it is not uniform over all its sales area.

Trial Examiner Norwood: Will Counsel make that in the form of an admission?

Mr. Wooden: Yes.

Trial Examiner Norwood: I do not think you need to prove it, then.

By Mr. Seeley:

Q. This goes to the extent, not only the fact that it does fluctuate—has the Missouri Portland Cement Company, Mr. Alexander, given any consideration to selling its cement at a uniform price at its mill?

37197 A. We have given that consideration, yes.

Q. And what conclusion, if any, did you come to?

A. We came to the conclusion that the fluctuation in demand geographically would bring about a feast or a famine operation if we were to do so.

Trial Examiner Norwood: Do not the fluctuations in the various other districts depend upon the same conditions that affect your district?

The Witness: Not necessarily.

By Mr. Seeley:

Q. Mr. Alexander, does your company report its production and shipments to the Bureau of Mines?

A. We do.

37199 Q. Now, what use, if any, do you make of those Bureau of Mines' figures?

A. As we receive the Bureau of Mines' figures we study them to see how cement consumption is running currently.

The witness identified Resp. Ex. 2794-A to D as a summary of the Missouri's cement distribution by states, as compared with the total consumption of cement by states, as reported by the Bureau of Mines. The records were made up in his office in the regular course of business each month upon receipt of the Bureau of Mines

37200 figures. It has been the practice of the company regularly to make such comparisons ever since he had been associated with it. These papers are typical of the records which Missouri does make up and has made up since he has been with the company on this subject.

Examination on Voir Dire by Mr. Wooden.

Q. What are the red figures that appear on these various sheets?

A. That shows the percent of plus or minus, and where there is a minus mark it means minus as compared to the year before, and where it shows a plus, plus as compared to the year before.

Q. Do you mean the difference in percentage that

37201 your shipments bear from one year—

A. As compared to another.

Q. The total of the Bureau is compared with the preceding year?

A. That is right.

Q. Some of the red figures have diagonal lines; that is plus, is it?

A. That is the plus.

Q. Are the figures for your mills shown on these sheets, are they the same as those reported by your company to the Bureau of Mines?

A. Exactly.

Q. Are you willing to have us check the figures on these sheets with the—

Mr. Seeley: I object, Your Honor. The question is improper. We have had that all up long ago. Any questions of that kind should be directed to counsel. Mr. Wooden knows it. He is a man of experience.

Mr. Wooden: Let me finish my question.

Mr. Seeley: I know. We have had that question up.

Trial Examiner Norwood: Let him finish the question.

Mr. Wooden: I am putting it up to the witness. He may put it up to you. Do you undertake to interfere with what he does as president of his company? Let me finish my question.

37202 Trial Examiner Norwood: I think, however, that he might be advised that he can refer that question to his counsel.

Mr. Wooden: He does not need advice of that sort.

Mr. MacIntyre: If he wants advice he can get it.

By Mr. Wooden:

Q. I am asking the witness if he is willing, as president of the Missouri Portland Cement Company, that we check the figures on these papers now offered in evidence with the reports he made to the Bureau of Mines?

Mr. Brick: I object to the question, if Your Honor please.

Trial Examiner Norwood: The objection is overruled. He may answer that if he wants to. He is fully advised at this time that he can answer it.

A. Subject to the approval of my counsel, I have no objections.

Mr. Wooden: Well, then, I ask if Counsel will give their consent.

37203 By Mr. Seeley:

Q. Mr. Alexander, are these papers, Respond-
37204 ents' Exhibits 2794-A to D, are these papers the original actual records from your books, or are they copies?

A. They are the originals.

Q. These are the papers from which the reports were made?

A. Those are the reports.

Q. They are the reports?

A. Yes.

Q. Do you vouch for their accuracy?

A. I do.

(RESP. EX. 2794-A to 2794-D were offered and received in evidence.)

37205 By Mr. Seeley:

Q. You said, Mr. Alexander, that you used these figures to test the efficiency of your sales department.

Do you make use of any figures on production or on stocks on hand?

A. We make no use of production figures or stocks on hand.

Q. Now, as to the figures incorporated in these figures which have just been introduced, do they represent figures for any particular Bureau of Mines' district or districts, or do they represent figures for areas into which you make shipments?

A. They represent the States into which we make shipments.

Q. And do you concern yourself, or have you ever concerned yourself, in your company, with statistics for areas outside of your sales territory?

A. We have not.

Q. Since you have been in the industry, do you know or have you heard of any so-called quota for any cement plant?

A. I have not.

Q. You referred a moment ago to the so-called forecast, I think is the description of the report on prospective building demand which your company receives. Do you know what process Mr. Mallory uses in assembling those reports?

A. I do not.

37206 Q. Do you in your company, or have your ever, to your knowledge, adjusted your rate of operations to any set percentage of your capacity?

A. We have not.

Q. Does the Missouri Portland Cement Company have any policy in regard to shutdowns, and, if so, what is it?

A. We shut down when our storage is full. We have no other policy.

Q. Coming to a new subject, Mr. Alexander: Has any cement company, other than your own, ever made any shipments of standard Portland cement for the Missouri Portland Cement Company?

A. No.

Q. Would you like to change your answer?

A. I remember that the Alpha Portland Cement
37207 Company, of St. Louis, made a shipment of two or three thousand barrels of cement for us several years ago.

Q. I show you Commission's Exhibit 2885, and ask you if that has reference to the shipment that you have just described?

A. I presume it does.

Q. What were the circumstances under which that shipment was made for your company, if you know, Mr. Alexander? Just briefly tell us what the facts were.

A. The job was located near the Alpha plant, and it was a job being built for St. Louis County, a road job being built for St. Louis County, and after we secured the order from the contractor he advised us that the county officials had insisted that he give part of the business to the Alpha Company, and he insisted that we purchase the amount of cement from the Alpha Company that he requested us to in order that he might comply with the county officials' request.

Q. Do I understand that your company ordered from the Alpha Company the amount that was requested, that the county official requested that you should order from them?

A. The amount that the contractor requested us to order from them to comply with the county wishes.

Q. How was the cement billed, if you know?

37208 A. The Alpha Company invoiced us, and we invoiced the contractor.

Q. At what price? Was it the same price or a different price from the price you had sold the cement for?

A. The same price we had sold the cement for.

Q. Has there been any other instance when any cement company has made shipments of standard Portland cement for your company?

A. No.

Q. Coming now to a different class of shipments, Mr. Alexander, has the Missouri Portland Cement Company ever shipped any standard Portland,—standard Portland cement, for any other cement company?

A. We have.

Q. Well, tell us what company or companies, if you recall?

A. I believe it was in 1932, or about that time, we
37209 made a shipment of six or eight thousand barrels of cement to various destinations in Southern Illinois and Eastern Missouri for the Marquette Cement Manufacturing Company on highway work, and—

A. In 1936 or 1937, I believe it was 1936, we made a shipment of seven or eight thousand barrels of cement for the Marquette Company to a contractor building a road out in St. Charles County, Mo.

Q. Now, referring to the shipments, did you tell us how many barrels, approximately, you shipped for Marquette in 1932 for the Marquette Company?

A. I think it was around six or eight thousand barrels.

Q. And as to that shipment, can you tell us, if you recall, briefly, what the circumstances were, what occasion did you have for shipping for the Marquette Cement Manufacturing Company?

A. They called us and asked us if we would make some shipments for them because they were out of cement, were short of cement.

Q. And how, if you know, were those shipments billed?

A. We agreed to bill them at the price at which they
37210 bid to the State Highway Departments for deliveries at those destinations to which we shipped.

Q. Now, as to the other shipments which you made for the Marquette Company in 1936, what were the circumstances with reference to that shipment?

A. They called us and asked us if we could ship some cement for a few days to this particular contractor, advising us that they were out of cement at Cape Girardeau.

Q. That is their Cape Girardeau plant?

A. Their plant.

Q. How was that cement invoiced?

A. We invoiced them at our current market price at destination.

37212 Q. Does the Missouri Portland Cement Company have, or has it ever had any working agreement of any kind with any other cement company?

A. We have not.

37213 Q. Do you have any qualifications which you look for in selling your cement to dealers, Mr. Alexander?

A. Yes.

Q. Is your idea of a dealer the same throughout your sales territory, or does it vary?

A. It varies, depending upon the community.

37214 Q. Does it, or not, vary according to the time?

A. It varies according to time to some extent, yes.

Q. Does your company sell the same type of dealers throughout its sales territory?

A. No.

Q. What type of dealers do you sell in the City of St. Louis?

A. We sell our cement to what is commonly known as hard building material dealers.

Q. What type of materials do they handle?

A. Well, they handle lime, plaster, cement, sand and gravel, stone, brick, and tile.

Q. Do you sell to all the hard building material dealers in the City of St. Louis?

A. No, we do not sell to all of them.

Q. Do you competitors sell to some hard material dealers which your company does not sell to?

A. Yes.

Q. Does your company sell to some hard material dealers which some of your competitors do not sell to?

A. Yes.

Q. What type of material dealers does your company sell to in Kansas City?

A. We sell to both hard building material dealers and lumber companies in Kansas City.

37215 Q. Are they known as lumber dealers?

A. Lumber dealers.

Q. In smaller towns, what type of dealer do you sell to?

A. Most generally to lumber dealers.

Q. Do the salesmen of your company have any instructions as to whom your company will sell as a dealer and whom you will not sell as a dealer?

A. They do not have any general instructions as to who we will sell, but they know in general about who.

Q. Are they instructed to make recommendations?

A. They are permitted to make recommendations subject to our consideration.

Q. Well, finally, does your company, in selecting its dealers have any set or fixed rule?

A. We do not.

Q. And has the Missouri Portland Cement Company ever had any understanding with any of its competitors

or any of the Respondents in this proceeding to limit its sales to people who are so-called—or within a so-called arbitrary definition of a dealer?

A. We have not.

Q. Has your company ever had any understanding with any dealer group or association to limit your sales in that manner?

A. We have not.

Q. In deciding whether you will sell a dealer or
37216 not, do you consider whether he has been recognized as a dealer by other manufacturers?

A. No.

Q. Do you know of instances where your company has refused to sell any dealers who are sold as dealers by competitors?

A. Yes.

Q. In giving consideration to the establishment of a new dealer account, does your company take into account or give any consideration to whether the dealer prospect is a member of any association of dealers?

A. We do not.

(The foregoing testimony beginning with "And has the Missouri Portland Cement Company ever" was adopted by Georgia, Oregon, Giant, Utah, Standard and Vulcanite.)

Q. Does your company—do you know of any instances where your company sells to dealers who are not members of dealers' associations?

A. Well, I do not know what dealers are members of associations. We have never made any inquiry.

37217 Q. Has The Cement Institute ever had anything to do with who your company recognizes or did not recognize as a dealer?

A. They have not.

Q. Has your company ever refused to sell any dealer because of the protest of any dealer organization or group?

A. We have not.

Q. Have you or have you not felt free to sell to any dealer that you chose to?

A. We have always felt free to sell any dealer that we chose to sell to.

Q. Do your company's dealers handle other brands, do you find?

(The foregoing testimony beginning "Has the Cement Institute ever had anything" was adopted by Georgia, Oregon, Giant, Utah, Standard, and Vulcanite.)

A. Most of them do; a few of them do not.

Q. And one further question: Does the Missouri Portland Cement Company distinguish between any so-called approved or recognized dealers and unapproved or unrecognized?

A. We do not.

Q. Coming to a new subject, Mr. Alexander, is
37218 the Missouri Portland Cement Company at present a member of The Cement Institute?

A. We are.

Q. How long, approximately, has it been a member, do you know?

A. I think since about 1930.

Q. Has it continued to be a member right up until this time?

A. Yes.

Q. When you became associated with the company, what service, if any, were you receiving from The Cement Institute?

A. We were receiving a contrast reporting service, a credit service.

Q. A what?

A. A contract reporting service, and I believe we were receiving a credit service, also.

Q. Do you consider those services of any value?

A. Yes.

Q. Prior to the period of the N.R.A., did you personally take any part of the activities of The Cement Institute?

A. I did not.

Q. During the N.I.R.A. did you attend meetings of The Cement Institute?

A. Yes, I attended some meetings.

Q. And what did you understand to be the purpose of the Institute during the N.I.R.A.?

37219 A. Well, I understood it to be a means through which the industry could cooperate with the N.R.A. officials.

Q. Have you ever been an officer of The Cement Institute?

A. I have not.

Trial Examiner Norwood: We will take a five minutes' recess.

(There was a short recess taken.)

Trial Examiner Norwood: Proceed.

By Mr. Seeley:

Q. I had asked you, Mr. Alexander, if you were ever an officer of the Institute, and your answer was what?

A. No.

Q. Have you ever been a trustee of The Cement Institute?

A. Yes.

Q. For what district?

A. For district 8.

Q. During what period, do you recall, were you a trustee, a district trustee?

A. I think I was elected district trustee in 1934, and served two one-year terms.

Q. Were you ever a trustee at large of The Cement Institute?

A. No, sir.

Q. While you were a trustee, did you attend the meetings of the board of trustees?

A. I attended some of them.

37220 Q. Were you ever a member of an executive committee of the board of trustees?

A. No, sir.

Q. While you were a trustee was the board of trustees made up of representatives of the small companies or of large companies?

A. District trustees were, as I remember it, representatives of small companies, generally.

Q. To your knowledge, was there ever any attempt made by any representatives of large companies to influence the actions of the board of trustees?

A. Nothing of that kind ever came to my attention.

Q. While you were a trustee of The Cement Institute, did the trustees ever give consideration to or attempt in any way to set or to influence the prices of cement?

A. No, sir.

Q. Has the board of trustees, or any of its members, to your knowledge, ever made any effort to determine or to influence the marketing policies of any of the members of The Cement Institute?

A. No, sir.

Q. Well, has there been any discussion of prices or marketing policies at any of the meetings of the board of trustees, or at any of the meetings of The Cement Institute which you have attended?

37221 A. None that I have attended.

Q. Has any other representative of the Missouri Portland Cement Company ever served as an officer or as a trustee of The Cement Institute?

A. No, sir.

Q. Did you ever attend any meetings of the Code Authority?

A. No, sir.

Q. Were you ever a member of the Code Authority?

A. No, sir.

Q. During the N.R.A. period, Mr. Alexander, did your company file prices with the Code Authority?

A. Yes.

Q. Did the Code Authority ever impose any restrictions on the prices that you had to file?

A. No, sir.

Q. Or on the terms and conditions of sale?

A. No, sir.

Q. Did any member of the Code Authority suggest to your company at any time what kind of prices and terms to file?

A. No, sir.

Q. Did your company feel free to file whatever prices, terms, and conditions of sale it desired?

A. We filed the prices and terms we desired.

Q. How long has it been, Mr. Alexander, since your company has filed any prices?

37222 A. We have not filed prices since N.R.A.

Q. Did you or any one else in your company, to your knowledge, ever request The Cement Institute to interpret any of your sales policies, or have they ever interpreted your sales policies?

A. No, sir.

Q. To your knowledge, has The Cement Institute ever had anything to do with cement specifications?

A. No, sir.

Q. Have any of the so-called larger companies, which are referred to in this record as "big fellows" and other terms used in describing them,—have any of those companies ever attempted to influence the Missouri Portland Cement Company with request to prices or terms or marketing policies?

A. No, sir.

37229 Q. Mr. Alexander, did your company receive any request from the Federal Trade Commission in 1931

for information concerning your sales on specific job contracts?

A. Yes.

Q. You recall such an inquiry?

A. Yes.

Q. Did that inquiry ask for information concerning your sales on "general contracts" and on "sales on the open market"?

A. Yes.

Q. Do you recall?

A. Yes.

37230 Q. And did you comply with those requests for information?

A. We complied with their request.

Q. Is Commission's Exhibit 3117-A to L, the reply of your company to those inquiries (handing papers to the witness)?

A. (After examining the papers.) Yes, this appears to be our reply.

37238 The witness identified Resp. Ex. 2795 as a classification of all cement sales by invoices of Missouri for the years 1930 to 1939 inclusive classified as to sales to dealers, highway departments, to the United States Government, to contractors and railroads. This was prepared at the end of each year from the customers' cards which the company keeps as a business record currently. He checked it for accuracy and can vouch for it. It is complete and represents Missouri's total sales during that period.

37239 (RESP. EX. 2795 was offered and received in evidence.)

Direct Examination By Mr. Seeley (Continued)

Q. Mr. Alexander, during the period that you reported your contracts to The Cement Institute, what did you understand the purpose to be?

A. We reported contracts in order that investigation could be made, an independent investigation could
37240 be made of them to see if there were any duplications or padding.

Q. Did your company receive reports from The Cement Institute advising that certain jobs covered by your contracts did not exist?

A. We did.

Q. Did you receive reports from The Cement Institute that in some cases that were duplications on jobs on which you had specific job contracts?

A. We did.

Q. When your company was so advised by The Cement Institute either that there was a duplication of a contract, duplication of contracts on a job which you were interested in, or that there was no such job, how did your company handle the situation?

A. When we were advised there was a duplication we immediately called on the purchaser and made an effort to secure shipping instructions or assurances that we would ship the cement. In cases where we were advised that no contract existed, we made a further check of the situation ourselves to see, satisfy ourselves that there was no such contract requirements.

Q. In cases where duplication was found to exist, how was it determined which cement manufacturer was to cancel its contract or did cancel it?

A. It was determined by the purchaser, as far as we were concerned.

37241 Q. Well, in a case of those contracts that you found were being followed by another company on which you also had contracts, did your sales department continue to follow it, or not?

A. Do you mean after being advised?

Q. After learning that there was a duplication.

A. We continued to follow it until we were advised—that is, definitely—that we would ship or would not.

Q. Advised by whom?

A. The purchaser.

Q. Did The Cement Institute ever suggest to you that your company should or should not cancel any specific job contracts?

A. Never did.

Q. In cases where duplications were found, did The Cement Institute make any recommendations as to who should ship or who should cancel the cement involved?

A. Never did to our company.

Q. Prior to the preparation of specific job contracts on the part of your company, did your salesmen have any instructions with respect to ascertaining the requirements of the job?

A. Yes.

Q. Well, as to those instructions, are you interested in this information at times of price changes or at other times?

A. We are interested in the information at all times.

Q. Why, Mr. Alexander?

37242 A. We are very anxious that our specific job contracts be accurate in estimates of the quantities required in order to avoid putting on our books an amount of cement which we will not ultimately ship, because it influences our operating plans and therefore throws them out of keeping with our shipments.

Q. Now, in the cases where your company has announced an advance in its prices, how much cement as your company permitted its customers to purchase,—has it made any limitations?

A. No limitation on the cement that they are willing to ship within 15 days of the date of the advance.

Q. You are willing to sell them all the cement that they wanted?

A. Any amount.

Q. At the lower price?

A. Yes.

Q. Was there any reporting during that period by your company of any potential or anticipated contracts?

A. We never reported a contract until it was actually signed up.

Q. In connection with the reporting of those contracts, did you ever report any price or file any prices at that time?

A. We did not.

Q. Was there any discussion of any so-called contract reporting activity at any of the meetings of The
37243 Cement Institute that you attended?

A. No, sir.

Q. Have you ever had—I am speaking now of the Missouri Portland Cement Company—any agreement with any competitors in regard to the cancellation of contracts?

A. We have not.

Q. Just let me ask you, did you or did you not consider the service, this reporting service, to be of value?

A. We considered it of value, distinct value.

Q. Is that your experience?

A. Yes.

Q. Has the Missouri Portland Cement Company ever instructed any of its salesmen that the Institute had anything to do with cancellations or duplications or padded contracts?

A. We have not.

(The foregoing testimony beginning "Have you ever had. * * * I am speaking now" was adopted by Georgia, Oregon, Giant, Utah, Standard and Vulcanite.)

Q. Coming to a new subject, Mr. Alexander:

How long have you been in the cement business?

A. About 17 years.

Q. Well, when you entered the industry was Portland cement standardized or was it not standardized as to its specifications?

A. It was standard specifications.

Q. Does the Missouri— May I have your answer?

A. There were standard specifications current at the time I entered the industry.

37244 Q. It was standardized?

A. Yes, sir.

Q. Does the Missouri Portland Cement Company's cement meet or exceed the minimum requirements of the A.S.T.M. specifications, and the specifications of the Federal Bureau of Standards?

A. They substantially exceed the specifications.

Q. Why is that, Mr. Alexander?

A. We want to make the best cement we know how at all times, and do not want to have it said in the trade that anyone else offers a better cement than our company.

Q. Has the Missouri Portland Cement Company ever made any effort or taken any activities, either with any of its competitors, or with any of the Respondents in this proceeding, towards standardization of specifications?

A. We have not.

Q. Have any of the competitors of the Missouri Portland Cement Company ever attempted to influence your company with reference to specifications or to the quality of the cement that it manufactures?

A. They have not.

Q. Was the Missouri Portland Cement Company
37245 ever made any efforts to eliminate or to discourage special specifications on cement?

A. We have not.

Q. Is your company a member of the American Society of Testing Materials?

A. We have a representative on the Committee C-1.

Q. Has that Society, to your knowledge, ever attempted to control or influence the specifications of the cement that your company manufactures?

A. No, sir.

Q. Have you ever had any discussions or conferences with respect to any advertisements or statements made by any of your competitors in respect to the qualities of their cements?

37246 A. We have not.

By Mr. Seeley:

Q. Have you ever found—you have told us about the quality of your cement. Have you ever found the difference in quality of different brands has been sufficient to command a premium in price, as to the price of your brand?

A. We have never been able to get a premium.

37254 Washington, D. C.,
April 24, 1940.

37255 M. MOSS ALEXANDER thereupon resumed the stand and testified further as follows:

Direct Examination By Mr. Seeley (Continued).

Q. Mr. Alexander, when you came to the Missouri Portland Cement Company, how were you selling— First, let me ask you, were you selling to ready-mix plants and to concrete products manufacturers?

A. Yes, we were selling the dealer and the dealer was selling the ready-mix plants and the concrete products manufacturers.

Q. Well, do you today sell to ready-mix plants and to concrete products manufacturers?

A. We sell them direct today.

37256 Q. You do sell both those types of customers, and you sell them direct?

A. Yes.

Q. Prior to the time that your company sold direct to concrete products plants did you have any technical men in the field?

A. No.

Q. Does that answer apply also to ready-mix plants, or does it not?

A. It does apply.

Q. It does apply?

A. Yes.

Q. Does the Missouri Portland Cement Company render any services today to concrete products manufacturers?

A. Yes. We have a concrete products expert who was in the business for many years, and who is a concrete engineer, who assists our customers in designing their mixes for concrete products, and assisting them in plant lay-outs, and so forth, to effect economies in their manufacture.

Trial Examiner Norwood: Is that to show competition?

Mr. Seeley: No, Your Honor. It does show—I agree with Your Honor that it does show competition, but it is in addition at this point to show the transition in this company's policies and the business reasons for it with respect to the charges in the complaint.

37257 Trial Examiner Norwood: I did not express any opinion on that. I merely asked you a question, is that to show competitive methods other than price competition?

Mr. Seeley: In answer to your question, Your Honor, it does show price competition. It also shows the effort of this Respondent Company to acquire and maintain a direct personal contact with its customers.

Trial Examiner Norwood: Well, I do not think you need to show that.

Mr. Seeley: To eliminate middle men—what is that?

Trial Examiner Norwood: I do not think you need to show that.

Mr. Seeley: Well, it is part of our proof, Your Honor, in meeting the charges here in connection with paragraph 7(e) of the complaint.

Trial Examiner Norwood: I think you can cover that entire subject with one proffer there.

By Mr. Seeley:

Q. Now, how long, Mr. Alexander, has your company been offering such services as you have described to concrete products manufacturers and to ready-mix plants?

37258 A. About four or five years, as I remember it.

Q. And have those services increased or decreased since you have been with the company?

A. We did not offer those services when I came with the company; they increased.

Q. I want to ask whether your answers apply to the so-called ready-mix plants customers of yours, as well as the concrete products manufacturers?

A. My answer applies to both.

Q. Well, tell us, Mr. Alexander, in just one answer why you came to the conclusion to sell those customers direct and to render those services yourself?

A. We saw an increasing need for technical services in that class of trade and did not feel that our dealers were in position to render such a service. We decided to sell them direct and render the services ourselves.

Q. Tell us generally, Mr. Alexander, on what types of work does the Missouri Portland Cement Company sell direct to customers?

37261 A. We sell concrete products plants direct. We sell ready-mix plants direct. We sell contractors their requirements for State highway work direct. We sell contractors their requirements for State highway work within the city limits the same as without the city limits.

The Witness: We sell large federal buildings direct, such as the Federal Court House in the City of St. Louis. We sell bridge work direct, where requirements are large enough that the dealer could perform no services.

Q. How about railroads? Did you mention railroads?

A. We sell railroads direct.

37262 Q. And counties, did you mention counties?

A. We sell counties direct.

Q. With reference to the period prior to the issuance of the complaint in this proceeding, and since you were with the company, since you came with the company, did you or did you not sell to State highway departments?

A. We did and we do now.

Q. And how did you sell them?

A. Direct.

Q. Showing you Respondents' Exhibit No. 2795, which is in evidence, and with reference to this column here, the third column, entitled "Sales to Highway Departments," will you tell us with respect to these years since 1930, which is within the period that you were with the company, until

1933, inclusive, do those figures represent the total business of that description that you sold during that period to the highway departments?

A. That is the total number of barrels that we sold to all highway departments, the years 1930 to 1933, inclusive.

Q. Was there any of that business for that period that you did not quote direct to the highway departments?

A. No business.

Q. Was there any change either in 1933 or in 1934 in the practices of the State highway departments in placing their requirements?

A. State highway departments in our marketing
37263 area discontinued purchasing cement for construction requesting the contractors to purchase their cement, and only made purchases for maintenance purposes.

Q. Was there any construction by the State highway departments in the beginning of 1934?

A. I believe there was a small amount in the early part of 1934.

Q. Now, before I was interrupted by Mr. Wooden, Mr. Alexander, I was asking you about classes of business that you sold generally to the customers, your customers, and I think you said that depending on the type of work, you did sell some of your products to contractors; is that right?

A. Yes.

Q. And in that connection has your company rendered any services to contractors?

37264 A. Yes. We render services to our contractor-customers.

Q. What are they, briefly?

A. We keep concrete technicians in the field to consult with them about concrete mix designs, and to aid them in selecting aggregates, and keeping them informed about work that is in prospects.

Q. How long has that been your practice?

A. Five or six years.

Q. That is, since you have been with the company?

A. Yes.

Q. And has it increased or decreased?

A. Yes. We have added additional men.

37265 Q. Now, in selling to these classes of customers which you have described with respect to your own company, what has been your policy—Well, let me ask you: Has your policy been flexible or inflexible?

A. It has been quite flexible.

Q. Has it or has it not been influenced by your experience in the trade?

A. It has been influenced by our experience.

Q. You told us, I think, that you have sold to contractors for work awarded by State highway departments; is that correct?

A. Yes.

Q. And does that cover a period of years prior to this complaint in this proceeding?

A. Yes.

Q. And how did you sell that work?

A. We sold it to contractors direct.

Q. Direct?

A. Yes.

Q. Did you furnish any cement on requirements for the Federal Courthouse in St. Louis?

A. Yes, we furnished all the cement on that building, as I remember it.

Q. What period are you speaking of now?

A. They started the construction of that building in 1934, I believe it was completed in 1935.

57266 Q. How was that cement sold by your company with respect to distribution?

A. Sold by our company direct to the contractor.

Q. Was that job located within the city?

A. Yes, it was in the heart of the business district of St. Louis.

Q. Tell me briefly in one answer, does your company make any distinction as to whether or not such jobs are within cities, towns, or villages?

A. It does not make any difference to us whether they are in the city or outside the city. If the dealer can perform no reliable service, why, we quote and sell many of them direct.

Q. Is that your criterion that your company uses?

A. Generally, generally, yes.

Q. You mentioned the sales to concrete products manufacturers. Does the Missouri Portland Cement Company make any differentiation in its policies in selling such customers according to the size of the concrete products manufacturer?

A. No. Our company sells both large and small concrete products manufacturers direct.

Q. And do I understand that if— Well, let me ask you: Do you consider in that connection the credit of those customers?

A. Yes, we consider the credit of all customers.

Q. Well, other than that, has your company ever made any distinction as to size with respect to how you
37267 sell those customers?

A. Not since we have been selling them direct.

Q. Does your company, or has it ever, since you have been with it, made any differentiation in your policy with respect to the business of concrete products manufacturers according to whether or not the customer had a so-called regular established place of business?

A. Are you speaking of concrete products?

Q. I beg your pardon; ready-mix plants.

A. No. Oftentimes the ready-mix companies we sell set up equipment especially to serve one job, and we sell them direct just the same.

Q. Again referring to the period prior to the complaint in this proceeding, Mr. Alexander, has your company sold any cement on so-called bridge jobs?

A. Yes. We sold several good-size bridge jobs prior to this complaint.

Q. And did you in selling those requirements make any distinction according to whether or not the job was inside a city or outside?

A. No.

Q. Did your company, the Missouri Portland Cement Company, receive any invitation, proposal to bid on cement for so-called W. P. A. requirements at Rolling Fork, Miss., in October, 1935?

A. It did not come to my attention at the time,
37268 but I have inquired about the matter later, and find that our sales department say they did receive such an invitation.

Q. I am referring, Mr. Wooden, to Commission's Exhibit 1063-A to D.

Q. Has the Missouri Portland Cement Company ever had any agreement with any of its competitors or with any dealer or any group of dealers that it would or would not bid on W. P. A. work?

A. We have not.

37269 Q. Did the Missouri Portland Cement Company send any representative to the State Procurement

Officer at Little Rock, Ark., in July, 1935, with reference to an alleged matter of placing requirements of the Procurement Division?

A. We did not.

37270 Q. Has the Missouri Portland Cement Company ever had any agreement or understanding with any of its competitors, or with any of the Respondents in this proceeding, with respect to alleged classification of customers or business?

A. We have not.

Q. Did you or did you not, to your knowledge—did any representative of your company ever have any meetings, or discussions with any of the representatives of the Building Supply Dealers' Code Authority?

A. Not to my knowledge.

Q. Since the period of the National Recovery Act, has your company made any changes in the classes of business that it sells direct from time to time?

A. We have made changes from time to time.

37271 Q. Do you recall a distribution policy announced by the Lehigh Portland Cement Company in February, 1935?

37272 A. Yes.

Q. How did you learn that?

A. We picked it up in the field.

Q. Did your company make any attempt to follow that policy, as announced by the Lehigh Company?

A. No, we made no particular attempt to follow that policy.

Q. And did you discuss the Lehigh policy with anyone connected with the Lehigh Company, or with any of your competitors?

A. We did not.

Q. Did your company ever make any agreement, to your knowledge, with any dealer or group of dealers to market its cement in accordance with any particular policy?

A. We made no such agreement.

Q. Well, as to your marketing policies since you have been with the company, and confining yourself to the period prior to the date of the complaint in this proceeding, do you or do you not consider your marketing policies to be in the interest of your company?

A. We think they are in the interest of our company.

37275 Q. Has the Missouri Portland Cement Company sold any cement for water supply development, Mr. Alexander?

37275 A. Yes. I think we furnished some cement on water supply jobs.

Q. Did you make any differentiation in your policy with respect to that kind of business, according to whether or not the work was located in a city, town, or village?

37276 A. No.

Q. Well, on what did you base your policy with respect to that?

A. Our policy would be based on a question of whether the dealer was in position to render the contractor a valuable service.

Q. Mr. Alexander, does the Missouri Portland Cement Company do any business with the United States Government at the present time?

37277 A. We do not.

Q. And how long is it since you have done any business with the United States Government?

A. The early part of 1937.

Q. Why haven't you done any business since then?

A. We haven't felt that in the interest of our company, to try to do business with the United States Government while we were being prosecuted by them.

Q. Well, have you ever discussed or had any agreement with any of your competitors with reference to bidding or declining to bid at the request of the United States Government?

A. We have not.

Q. Has the Missouri Portland Cement Company
37278 ever withdrawn or requested the right to withdraw any bid made to the Federal Government or to any State Government?

A. No.

Q. As to the business which you did do with the Federal Government prior to 1937, I note that in respondents' Exhibit 2795 there were some sales in the period 1932 to 1936. As to the business that you did do with the Federal Government, did you or did you not find that your sales expense was any less on that type of business than it was on your regular commercial business?

A. We did not find that our sales expense was less.

37280 Q. Do you feel, Mr. Alexander, that the Government is entitled to any preference over your other customers?

A. We do not.

Q. Has the Missouri Portland Cement Company, in quoting to the Federal Government prior to 1937, and to State Governments, made any attempt to go beyond the territory which is its normal sales territory in quoting to other customers?

A. No, we have made no attempt to go beyond our territory that we normally solicit business in.

Q. Has your company ever submitted any bids to the State Highway Commission of Oklahoma? I am referring now to the complaint in this proceeding, paragraphs 12 and 13.

A. We have not.

Q. Well, tell me: Has your company ever received any proposals from the State of Oklahoma?

A. We have not.

Q. Were you ever on the mailing list of the State
37281 of Oklahoma, to your knowledge?

A. We were not.

Q. Has the Missouri Portland Cement Company ever been interested in any so-called T.V.A. business?

A. No.

Q. Has your company ever solicited any business or shipped any cement into the State of South Dakota?

A. No.

Q. Has your company ever had any policy of declining to quote to the State Governments within its normal marketing area?

A. We have not.

Q. I am referring to the complaint, the paragraphs heretofore cited.

Does your company, the Missouri Portland Cement Company, or has it ever made any—make, or has it ever made any sulphate resistant cement?

A. We have not.

Q. Do you recall any proposal—I refer to Commission's Exhibit 1341—asking for quotations on requirements for sulphate-resistant cement in April, 1938?

A. I recall no such proposal.

Q. If you did have such a proposal, would your company or would it not bid?

A. We would not bid.

Q. Has the Missouri Portland Cement Company
37282 ever solicited any business in Colorado or Utah or Texas?

A. We have not.

Q. I am referring now to Commission's Exhibits 1387 and 1389.

Do you know, Mr. Alexander, whether your company received invitations from the Procurement Division of the United States Government in May, 1938, to bid on cement for use in Colorado and Utah?

A. Not to my knowledge.

Q. Did you know that you were on the mailing list of the Procurement Division on those invitations?

A. No.

37284 Q. Going to a new subject, Mr. Alexander: What are the terms of sale of the Missouri Portland Cement Company?

A. Ten cents a barrel discount for payment of invoices within 15 days of date; 30 days net.

Q. Since you have been with the Missouri Company, has there been any change in terms of sale of your company?

A. Yes.

Q. What change has there been?

A. We formerly allowed a dealer's discount at the time invoices were paid.

Q. Did the Missouri Portland Cement Company—you say formerly do I understand that you discontinued that dealer's discount?

A. Yes.

37285 Q. Did the Missouri Portland Cement Company issue any announcement at the time it discontinued the dealer's discount?

A. We did.

Q. Is Respondents' Exhibit No. 659 a copy of that announcement?

A. Yes.

Q. What was the purpose of your company in issuing that announcement?

A. We did not feel that the dealer's discount accomplished anything, and we decided to abandon it. It was meaningless.

Q. Did you or did you not hope to improve your position with the dealers in issuing that announcement?

A. Yes, we attempted to—

Q. Speaking now of the dealers of your company.

A. Yes. We believed that our abandonment of the dealer's discount would be the proper thing to do.

37286 Q. Has your company ever had any agreement with any of its competitors with respect to the terms of sale and discount that you would use?

A. We have not.

37287 Q. Mr. Alexander, have you ever found or learned any of your competitors offering more favorable discount terms than your company has offered?

A. Yes.

Q. How did you learn of that?

A. We learn of it through our customers.

Q. How did it affect your company's business, if it did?

37288 A. We lost orders as the result from time to time.

Q. Are you speaking now of prior or subject to the date of the complainant in this proceeding?

A. Both.

37289 Q. Mr. Alexander, coming to a new subject: Do you recall any highway letting of the Missouri State Highway Commission in the month of January, 1931?

A. I do.

Q. Did your company bid on this invitation?

A. We did.

Q. I am now showing Commission's Exhibit 2439, which is what purports to be a tabulation of bids of various companies on that. I think on that letting will you look at that, please, and tell us if that is the letting to which you have referred in your prior answer?

A. Yes.

Q. Subsequent to the bidding—subsequent to the bids which the Missouri Portland Cement Company made on that letting of January 20, 1931, did your company make any change in its prices?

A. Yes.

Q. Well, when? How soon after that, if you recall it?

A. Well, some 15 or 20 days after.

Q. What were the circumstances?

37290 A. At this particular letting one of the companies bidding bid on a substantial amount of cement at prices approximately 20 cents per barrel under our cur-

rent market prices, so we reduced our current market prices approximately 25 cents per barrel in order to be more competitive with general conditions.

By Mr. Seeley:

Q. Did that reduction that you speak of,—was that made available by your company to all of your customers?

A. It was.

Q. Will you tell us how did the new prices which you have told us your company quoted compare generally with the prices which you found by this competitor on the letting of January 20, 1931, if you recall?

A. Prices were established—prices we established were approximately 4 cents per barrel less than the prices which they bid on the highway letting.

Q. Mr. Alexander, taking up another one of these lettings which has been placed in issue by the Commission—Before doing so, I want just to ask one further question with respect to the other letting covered by Commission's Exhibit 2439: Do you recall whether or not the bids on that letting were rejected or whether any awards were made?

A. All bids were rejected.

37291 Q. I now ask you whether you recall if your company made any bid to the Missouri State Highway Department in March, 1931?

A. We did.

Q. I show you Commission's Exhibit 2440, consisting of two pages, will you tell us whether this tabulation covers the letting which you have now referred to in your answer?

A. It appears to. Yes.

Q. In bidding on that letting, Mr. Alexander, which referred to or covered by Commission's Exhibit 2440, did your company make any change in its prices,—in its current prices theretofore?

A. Yes, we bid prices that were lower than our current market prices.

Q. What were the circumstances?

A. Well, consumption of cement was declining rapidly, and we were quite anxious to keep our plants running, so we decided to reduce our price in an effort to secure more business.

Q. Well, did you or did you not make those prices available to your trade generally?

A. We made them available as of the same date we bid the highway department.

Q. That is, you gave your customers, do I understand, the benefit of the reduced prices which you bid to
37292 the highway department?

A. We did.

Trial Examiner Norwood: Did that bring about a general decline in your territory?

The Witness: It did.

Trial Examiner Norwood: Did that pay you to do that in the long run?

The Witness: Your Honor, apparently it did not. The Highway Commission permitted our competitors to meet our prices.

Trial Examiner Norwood: Otherwise, it would have helped you, would it?

The Witness: Well, it may be that it would have helped us. We had hopes that it would at the time we placed the bid.

By Mr. Seeley:

Q. His Honor's question prompts me to ask you, Mr. Alexander, whether on this letting as a result of these prices which you quoted, did your company, or did it not, receive a larger amount of business—did it increase its tonnage as a result?

A. We received about the same percentage of the total award as we had in previous years.

Q. Do you recall, Mr. Alexander, whether your
37293 company made any bid to the Missouri State Highway Commission on its requirements in the month of October, 1931?

A. Yes, we did.

Q. I show you Commission's Exhibit 2441, consisting of two pages, purporting to be a tabulation of bids. Are the bids referred to there the bids submitted in the letting to which you have just referred in your answer?

A. Yes.

Q. In bidding on this letting, Mr. Alexander, did your company make any change in its prices, in its current prices prior to the date of submitting the bid?

A. Not prior to that.

Q. That is in the prices, current—which were current prior to your bid.

A. Not prior to our bid. We bid substantially less than

our current market prices and further reduced our current market prices to the trade as of the same date.

Trial Examiner Norwood: In that bidding, were you the low bidder of all?

The Witness: This particular letting, I think we were low bidder at all destinations but three or four, probably, Your Honor.

By Mr. Seeley:

Q. And how many destinations were there, Mr. Alexander, approximately?

37294 A. Well, I would have to count them.

Q. Would it be more than a hundred, or less?

A. More.

Q. Well, His Honor's question prompts me to ask you one further question. Did the Missouri Highway Department make an award to your company on all of the cement on which you were a low bidder?

A. No.

Q. How did it purchase its requirements other than the award that was made to you, if you know?

A. Yes. They permitted our competitors to meet our prices on a substantial part of the business on which we were low bidder.

Q. Now, you have told us that your company bid lower prices on these lettings to the Missouri State Highway Department. Just tell me in one answer, was the result satisfactory or unsatisfactory to your company?

A. Well, it was most unsatisfactory. We lost about a million dollars, I think, during the time.

37299 Mr. Wooden: Your Honor, I would be willing to concede what is a matter of common knowledge, and what may be judicially noticed, that all business men at all times are concerned primarily with whether they are making or losing money, and they fix their policies with regard to it.

Mr. Brick: Well, what was the purpose then, if I may ask Mr. Wooden, in your objecting to the witness' answer that he was motivated in not having done a thing the second time because the first time he did it he lost a million dollars. I do not see the consistency.

Mr. Wooden: The issue is whether there is a combination to fix prices, and whether they have the combination or not because they want to make more money, or lose less

money is not in issue. It is a question of whether or not they have a combination.

37304 By Mr. Seeley:

Q. Now, you mentioned a change in your policies, Mr. Alexander, and you said, I think, that subsequently you quoted prices which were higher than those lower prices which had caused these losses.

A. We did.

Q. Now, did the Missouri Portland Cement Company make any change in its prices in the month of June, 1932, to your recollection?

A. We increased our prices in the vicinity of our Sugar Creek plant during June, 1932.

Q. And what was the occasion?

A. We were desperate. We were losing money, and were very anxious to try and secure more money for our cement.

37305 Q. Did you consult any of your competitors before issuing those new quotations?

A. We did not.

Q. Will you tell us whether or not you observed that any of your competitors met those prices which you have just told us you issued quotations on?

A. They seemed rather slow in meeting them, but after some ten or fifteen days they did begin to meet those higher prices.

Q. You told us about the vicinity of your Sugar Creek plant. Did the Missouri Company at that time make any change in its prices in the vicinity of its Prospect Hill plant?

A. We did not increase our prices at the Prospect Hill plant at that time, in the vicinity of the Prospect Hill plant.

Q. Why not, Mr. Alexander?

A. Well, we were anxious to see if the prices would stick that we quoted in the vicinity of the Sugar Creek plant.

Q. Do I understand that you had no assurances that the prices would be followed when you issued those quotations?

A. We certainly did not.

37306 Q. Well, did you, Mr. Alexander, have any assurance?

A. We did not.

Q. Did the Missouri Portland Cement Company make

any change in its prices in the following month of July, 1932, Mr. Alexander? Do you recall?

A. Yes. In the latter part of July, 1932, we raised prices in the vicinity of our Prospect Hill plant.

Q. What was the occasion for that? Tell us about the circumstances?

A. We had picked up quotations in Illinois, northern and central Illinois, which were higher than the prices which we had been quoting, and also southern Illinois and southern Missouri, which were higher than the prices we had been quoting, so we felt that we might be able to make a price advance stick, and therefore increased our prices.

Q. Did you consult any of your competitors before issuing those new quotations in July, 1932?

A. We did not.

Q. Do you recall, Mr. Alexander, any quotations of the Lone Star Company in the month of April, 1933, reflecting a change in its prices? I am now referring to Commission's Exhibits 1121-A to blank.

A. Yes. I remember their attempt to raise their
37307 prices in the vicinity of their Bonner Springs plant at that time.

Q. Did your company meet those quotations?

A. We did not.

Q. Why not?

A. Well, we did not find any of the other cement companies following the advance, and we did not believe they would be able to make it stick, so we did not feel like following it.

Q. Did you make any change in your prices subsequently? I refer to the month of July, 1933. Can you recall any change in your prices at that time?

A. Yes. We increased our prices in July, 1933.

Q. And what is your recollection of the circumstances for that change in your prices?

A. The Lone Star Company had sent out increased prices in the vicinity of their Bonner Springs plant, and we decided to follow the advance.

37309 Q. Mr. Alexander, are the mills of the Missouri Portland Cement Company, so-called basing mills or non-basing mills?

A. They are basing mills, so-called.

Q. When you became associated with the company, were those mills, or either of them, basing mills or non-basing mills?

A. Both of them were so-called basing mills.

Q. Well, since you have been with the company have those mills been continuously basing mills? I refer to each of them.

A. The Prospect Hill mill has been continuously a basing mill, but Sugar Creek mill has not.

Q. What were the circumstances under which the Sugar Creek mill was not a basing mill?

A. At the time we found Lone Star's quotation 37310 in the field in 1933 we followed their prices and did not quote prices which reflected a base at our Sugar Creek plant.

Q. Then, following the prices, did that enable you to get more money for your cement, or did it not?

A. It enabled us to secure higher prices at some destinations.

Q. Has the Missouri Portland Cement Company ever notified any of its competitors that its Sugar Creek plant should or should not be considered a mill base?

A. We did not.

Q. Did you, Mr. Alexander, or anybody in your company, to your knowledge, ever discuss with any of your competitors the question of whether the Sugar Creek plant of your company was or was not or should or should not be a mill base?

A. We did not.

Q. Subsequent to the date—the period that you have just referred to, at which you say you followed quotations of a competitor which could not reflect a base at your—a mill base at your Sugar Creek plant, did you make any quotations which did reflect a mill base at your Sugar Creek plant?

A. We did.

37311 Q. And what was the occasion or the circumstances for that?

A. We found prices being quoted in the vicinity of our Sugar Creek plant lower than the prices that we were quoting, so we established new prices which were lower and which reflected a base at Sugar Creek.

Mr. MacIntyre: May we have the date fixed on that?

A. As I remember it, it was about two years ago.

By Mr. Seeley:

Q. Has your company ever furnished any of your salesmen with a list of base prices, Mr. Alexander?

A. We have not.

Q. Has your company ever established, or attempted to establish, any so-called basing points at any of its competitors' mills?

A. We have not.

37312 Q. Now, you told us about some changes in your prices in 1931 and 1932, Mr. Alexander. Yesterday Mr. Wooden referred to a price change I think in July, 1932. I want to ask you one question: Did your price changes that you have told us about, or price increases which I just questioned you about, have anything to do with, or were they the reason for your rejoining the P. C. A., the Portland Cement Association?

A. They had nothing to do with our joining the Portland Cement Association.

37313 Q. Coming to a new subject, Mr. Alexander, does the Missouri Portland Cement Company have a traffic department?

A. We do have.

Q. Does that traffic department compile any freight rates?

A. They compile freight rates.

Q. How long has your traffic department compiled freight rates?

A. Ever since I have been with the company.

Q. Are they the rates that you use in your company?

A. They are the rates we use.

Q. At the time that you came with the Missouri Portland Cement Company was your traffic department compiling all of the freight rates used by your company?

A. They were.

Q. Have those compilations been kept up continuously since that time by your company?

A. They have.

Q. Have those compilations covered all of the territory, or part of the territory in which you do business?

A. All of the territory.

37314 Q. How are they prepared—that is, in what kind of tabulations or books?

A. Our traffic department prepares and keeps up to date freight rate books, rates therein are taken from the official tariffs.

Trial Examiner Norwood: Is that the rates that you use in making prices?

The Witness: Yes.

By Mr. Seeley:

Q. From what points do your compilations show rates, that is, in tabulating these, in preparing these compilations, what shipping points does your traffic department consider?

A. They consider all points of cement origin we feel might compete with us in the territory where we are seeking business.

Q. Do you consider whether those points are so-called basing mills or non-basing mills?

A. We give that no consideration.

Q. Has the Missouri Portland Cement Company ever exchanged any freight rates with any of its competitors?

A. We have not.

Q. I think you told His Honor that your sales department uses the freight rates which are compiled by your traffic department; is that right?

A. The freight rates that we use are compiled by our traffic department.

37315 Q. Has your company received the freight rate books issued by The Cement Institute?

A. I think we have received one book for each State in which we normally do business.

Q. Well, what use, if any, has the Missouri Portland Cement Company made of the freight rate books that you receive from The Cement Institute?

A. As our traffic clerks have had time, they have checked with the our books with the books of the Institute to see if errors occurred.

Q. Well, other than checking its own rate compilations, has the Missouri Portland Cement Company ever used the freight rate books of The Cement Institute for any purpose?

A. For no other purpose than checking.

Q. Have you ever used the rates or any rate in The Cement Institute freight rate book for the purpose of quoting prices?

A. We have not.

Q. As a member of The Cement Institute, do you understand, or have you ever understood that you are expected to use The Cement Institute freight rate books in quoting prices?

A. We have not.

The foregoing testimony beginning "As a member of

The Cement Institute, do you," was adopted by Georgia, Giant, Standard and Vulcanite.)

Q. In this checking process that you have referred to, were you and do you check your books—do you use the books of the Institute to check for possible errors in your books, or vice versa?

37316 A. We use them to check for possible errors in our books.

Q. Has there been any understanding at any time between your company and any of its competitors with reference to the use of freight rate-books?

A. There has not been.

Q. Or any of them?

A. There has not been.

(The foregoing testimony beginning with "Has there been any understanding at any time" was adopted by Georgia, Oregon, Giant, Utah, Standard and Vulcanite.)

37324 Q. Mr. Alexander, have you, in the territory in which you do business, found any prices of competitors that do not accord with the market prices as you have found them?

37325 A. Yes. We find prices being quoted to our customers that are less than our market prices.

By Mr. Seeley:

Q. And as to those prices, I want to know what you have found in your day-to-day business. Have they or have they not been sufficient to deflect business to competitors?

A. Yes, they have been reflected in business going to our competitors.

37326 Q. Have these prices to which you referred, Mr. Alexander, been lower or higher than the market prices that you found?

A. Lower.

Q. And were they lower or higher than the published prices of the companies which you found giving those prices?

A. Lower than the published prices.

Q. Do you mean that they were not published, they were not known? Were they secret or were they not secret? That is my question.

A. Well, they were of the type of prices that I would call secret.

Q. I want to know, Mr. Alexander, since you have been with the company, has there been any time when you have not found such prices being made to customers, in your business experience?

A. We find them being made most of the time in some part of our trade territory. It varies from time to time. It is more prevalent at some times than at others. It moves around from one part of the territory to the other.

Q. Is there more of it at some times than at other times?

A. Yes, there is more some times than at others.

Q. What has been the policy of your company; have you met any of those prices that you found customers were getting from competitors?

A. Yes, sir.

Q. At prices which were lower than their published prices?

A. Yes; we have met some of them, particularly when our good customers are involved.

Q. You mentioned your "good" customers. As to your own customers, what have you found as to whether or not they give you an opportunity to meet those prices?

A. Most generally they will give us an opportunity to meet them.

Q. In cases where you have met these prices, would you say your customers have given you an opportunity to meet—and I am now referring to these prices which are lower than or different from the published prices of your competitors—in cases where you have met those prices, have you reduced all of your prices to accord with those prices which you get in meeting competition?

A. No.

Q. Tell us why you have met those prices?

A. To avoid losing our customers, and because we needed the business.

Q. Mr. Alexander, do you know of any so-called reciprocity between any cement manufacturers in your sales territory?

A. No.

Q. As to prices or marketing policies or exchange of business?

A. No.

Q. What is your own attitude toward your method of selling? Do you consider that it has lessened competition in your area?

A. No.

Q. Does your company sell any cement in bulk, Mr. Alexander?

A. Yes.

Q. Has there been any changes in the prices that you charge for cement in bulk, for bulk delivery?

A. Yes.

Q. Since you have been with the company?

A. Yes, sir.

Q. What is your recollection as to what those changes were, when, and what was the occasion, so far as your company was concerned?

A. At one time our company sold bulk cement for 10 cents per barrel less than we sold package cement, 37330 after deducting the package, and in more recent years we have only allowed 5 cents per barrel reduction as compared with package cement, after deducting the cost of the package.

Mr. Wooden: Can you fix the time?

By Mr. Seeley:

Q. Can you tell us what period you are speaking of, Mr. Alexander?

A. During 1932, when the prices were so low, some of the companies started to bid to State highway departments according to the tabulations, and allowing only 5 cents per barrel differential, and we have followed it since.

Q. You have followed that change in prices which you observed?

A. Yes, sir.

Q. On those highway lettings?

A. Yes, sir.

Q. I intended to ask you earlier regarding the matter of your practices with respect to Commission's Exhibit 561. I will do so now. Do you recall a so-called Compendium of Trade Practices?

A. Yes, I remember some discussion about it.

Q. I show you Commission's Exhibit 561 and ask you if that is the Compendium that you have in mind. 37331 (handing the exhibit to the witness)?

A. Yes.

Q. Mr. Alexander, did your company make any change in its marketing policies or practices as a result of the issuance of this Compendium?

A. We did not.

Q. Did your company use that Compendium in any way?
A. We did not.
Q. Did the Missouri Portland Cement Company agree with any of its competitors to follow any of the practices contained in the Compendium?
A. We did not.
Q. Coming back to where we were before we adjourned, Mr. Alexander, I will refer you to the practice of
37332 your traffic department of filing rates, and you told us that you checked the Institute books on occasion against your own freight rate compilations to ascertain whether there were any errors on your books; your own freight rate compilations. In making corrections to your freight rate compilations, your own books, what source have you used for authority?
A. We have always used the rate published in the official tariffs.
Q. Do the freight rate compilations prepared by your traffic department show carload rates on cement, or do they show rates in term of weight?
Q. Do you understand my question?
A. I do—rates per hundredweight.
Q. Does the sales department of your company, Mr. Alexander, make any use of any conversion tables?
A. Yes.
Q. Who prepares those conversion tables that are used by your company?
A. We do.
Q. And how long has your company prepared its own conversion tables?
A. Ever since I have been associated with the company.
37333 Q. Has your sales department, or any other department of your company, ever used any conversion tables other than those you, yourselves, prepared?
A. We have not.
Q. Do the salesmen of the Missouri Portland Cement Company carry your freight rate books?
A. They do not.
Q. Or any freight rate books?
A. They do not.
Q. Have they ever carried any freight rate books?
A. Not since I have been associated with the company.
37334 (RESP. EX. 2798 and 2799, were offered and received in evidence.)

By Mr. Seeley:

Q. Mr. Alexander, in making shipments to the points where your company does business, are your employees familiar with the routes?

A. Yes, they are.

Q. What factor does your company consider in routing shipments?

37351 A. It considers the costs involved, and the service rendered.

Q. To your knowledge, are there any so-called short-haul rates available in your sales territory?

A. Not to my knowledge.

Q. Does your company make up any customers' cards from these freight rate sheets which you prepare?

A. Yes.

By Mr. Seeley:

Q. Do those cards contain any routing?

A. They contain the routing.

Q. When is that put on?

A. At the time we make the card out.

Q. And where is it taken from,—the routing?

A. Taken from the official tariffs.

37352 The witness identified Resp. Exs. 2811-15-A and B as Missouri's dealer cards. The prices on these
37353 cards were used at the destinations indicated on Com. Ex. 2450. They contain the routing to those destinations. The cards are used in the regular course of business and were typical of the cards which Missouri keeps in connection with quotations and records of prices from which it makes quotations.

Mr. Seeley: I offer Respondents' Exhibits 2811 to 15-A and B, in evidence.

Mr. Wooden: Objected to as irrelevant, immaterial and cumulative.

Trial Examiner Norwood: What are they offered to show?

37354 Mr. Seeley: They show typical samples of original records of the company. Here are cards which show the price quotations of this company for the period in question and for destinations on which it quoted cement in connection with the requirements of the Missouri State Highway Commission in July, 1935, which requirements were put in evidence as Commission's Exhibit 2450-A to blank.

37355 Trial Examiner Norwood: These prices were arrived at by figuring back to a basing point, were they?

The Witness: Those prices were arrived at by either adding freight to our so-called base or meeting the price of some competitor.

Trial Examiner Norwood: Yes.

Were they made out after you made the bid there or at the time you made the bid?

The Witness: No, Your Honor. They are dealers' cards which are regularly carried in our files and on which the price is recorded.

Trial Examiner Norwood: Objection sustained.

I do not see that that adds anything whatsoever to the information that this witness can give us.

By Mr. Seeley:

Q. Mr. Alexander, I want to ask you one question with reference to Respondents' Exhibits, for identification, 2800 to 2810, as well as Respondents' Exhibits, in evi-
37356 dence, 2798-99. Why do you keep these records of freight rates in your company?

A. We keep these records of freight rates in order to be able to quote and ship cement.

Q. What is your attitude in your company? Do you consider that you can or cannot dispense with a record of freight rate information?

A. We feel that it is necessary to have accurate freight rate information quickly available, and therefore we prepared in these books—form—book form.

Cross-Examination by Mr. Wooden.

Q. Mr. Alexander, you testified that you used The Cement Institute freight rate books to check against your own freight rate book.

A. I testified that our traffic clerks had them checked for error.

Q. Can you say how many and how much differences you have found in the course of that checking?

A. No, I can't tell you that.

Q. You have no idea as to whether the differences were many or great?

A. I don't believe they found so very many errors.

Q. But you do not know how many?

A. I do not know how many.

37357 Q. I believe you said that you always used the tariffs. Why did you make any check with the freight rate book of the Institute if you always used the tariffs?

A. I said we always referred to the tariff to arrive at the final rate.

Q. Why make any check of the Institute book if you want to always use the tariff?

A. It is an additional check for accuracy. I find that traffic men vary in their opinions about which rate applies, and so forth.

Q. In other words, what the correct rate is is a matter of opinion sometimes; is that right?

A. Well, two traffic men will differ at times.

Q. Two experts will differ on what is the correct rate out of a given tariff; is that right?

A. Very seldom they do, but occasionally.

Q. Is the method of conversion from a hundred pounds into cents per barrel the same as is used by your company with the method used by your competitors?

A. I do not know what method our competitors use.

Q. Well, how is your conversion table made up?

A. It converts cents per hundredweight into cents per barrel.

Q. Yes, but how is it done? What is the formula used? What method do you use?

A. We multiply the cents per hundredweight by 380.

37358 Q. And in the case of fractions, what do you do?

A. We drop fractions.

Q. You drop them when?

A. We drop them when they are less than half a cent and add when they are more than half a cent.

Q. Less than half a cent per barrel?

A. Yes.

Q. Now, you say the freight rates in the freight rate book that you have are compiled by your traffic department from the tariffs, the railroad tariffs, and include the shipping points of all competitors; is that right?

A. All competitors which we feel might be competing in the State in which the rates are made.

Q. Well, all right.

What use has your traffic department for the rates from

the mill of your competitors as distinguished from the rates from your own mill?

A. They want to see if they can develop what our competitors might be quoting also.

Q. Your traffic department is concerned with that?

A. They are concerned with preparing the rates for the sales department.

Q. Your traffic department, however, has not any use for traffic purposes, has it, for the rates from other mills than your own?

37359. Mr. Brick: We concede that, Mr. Wooden.

A. For traffic purposes, I cannot think of any.

By Mr. Wooden:

Q. Then it is, as you said a moment ago, it is for pricing purposes?

A. It is for the convenience of our sales department.

Q. In pricing?

A. Yes, in—

Q. In making delivered prices?

A. In developing what the competition may be.

Q. At the destination?

A. At the destination.

Q. Do railroad freight rates vary between the same points, depending upon the route that is used?

A. Occasionally.

Q. I believe you said you decided which route to ship on according to the cost of the shipment; is that what you meant?

A. I said we took the cost and service into account.

Q. Do you mean by cost whether one route was lower in rate to the same point than another?

A. Well, we—yes.

Q. What do your traffic men, or your officers, know about the routes that may be used from other mills?

A. Well, there is always a short-line rate published, Mr. Wooden.

37360 Q. You assume that the short-line rate is what your competitors are going to use for their shipping?

A. We would be afraid to assume anything else.

Q. Do you assume that the short-line rate is what they are going to use for their pricing?

A. We would be afraid to assume anything else.

Q. Why would you be afraid; if they used a higher

rate wouldn't that just make them higher at destination than you?

A. It might.

Q. You would not need to be afraid of that, would you?

A. Well, not necessarily.

Q. Can you give any specific instances prior to July, 1937, where your competitors were quoting delivered prices that were lower than yours?

A. Prior to 1937?

Q. Yes.

A. Yes. I think I can give some.

Q. Will you do so?

A. Well, there was a road job in southwestern Missouri being built by the Kelly Underwood Company.

Q. When was this?

A. I think it was in the latter part of 1935, and the early part of 1936 in which prices were quoted less than the price that we were quoting.

Q. How do you know?

37361 A. The contractor told us.

Q. Are there any other cases like that?

A. Yes. I have in mind the job being built by the Perry McLoan Construction Company.

Q. When?

A. In 1936, in Missouri, in which the prices were less than the prices we quoted.

Q. And did you find out in both of those cases who was making the lower price?

A. Yes.

Q. Who was it?

A. Lehigh Portland Cement Company.

Q. In both cases?

A. Yes.

Q. In both cases you got the information from the contractor?

A. Yes.

Q. Were those rather large jobs?

A. Yes.

Q. Did you meet the prices?

A. We did not in those particular instances, no.

Q. Why didn't you?

A. Well, we did not see fit to. We did not want the business at the prices they claimed they could get it at.

Q. Well, all you know about it is what the contractor claimed?

37362 A. We felt the contractor was telling us the truth.

Q. But that is all you knew?

A. Yes.

Q. Why didn't you meet it then?

A. I said we did not want the business at the prices they told us they were able to buy the cement at.

Q. Can you name any cases of dealers where your competitors were making a delivered price lower than yours and prior to 1937, July?

A. I did not refer to dealers in my testimony.

Q. Well, in other words, your testimony was not intended to apply to dealers' sales?

A. Not particularly.

Q. Can you state any specific instances in which your competitors quote delivered prices lower than you on bids to the Federal Government since 1933 and prior to July, 1937?

A. Well, they quote lower prices on most of the jobs on which we bid because we were high.

Now, to remember the particular jobs and the prices bid, Mr. Wooden, I do not believe I could enumerate.

Q. Can you cite any case,—name any such case?

A. Yes. I think that there were several jobs in which we bid up and down the Mississippi River for cement requirements, say between Cairo and New Orleans.

Q. When was this?

37363 A. Well, this is between 1930 and 1937. Is that the date you asked for?

Q. Wasn't it also between 1930 and 1933?

A. Well, I believe that it continued in that period down to date.

Q. Can you name any specific cases since 1933 and prior to July, 1937?

A. Yes—I have in mind a job at Vicksburg, on which the Monarch Company was the low bidder.

Q. And when, and who was the buyer?

A. I believe that was in 1935, to the War Department, I believe.

Q. And who was the buyer?

A. I think it was the War Department.

Q. The War Department?

A. Yes.

Q. That sale you referred to there figured before the Trade Practice Committee of the Institute, didn't it?

A. Well, I do not know when the Trade Practice Committee—I do not remember when the Trade Practice Committee came into being.

Q. Well, you were on the board of trustees, weren't you?

A. I was on the board of trustees I think in 1935 and 1936, for about two years.

Q. Well, weren't you on in 1934?

37364 A. Well, I am not sure about that; maybe it was in 1934.

Q. Can you name some specific instances between 1933 and 1937, in July, where the Missouri Portland Cement Company made a lower delivered price on any specific business than its competitors?

A. Yes. We made a lot of lower prices to the State Highway Department of Missouri and to the State Highway Department of Illinois.

Q. Subsequent to 1933?

A. Oh.

Q. Between 1933 and 1937.

A. 1933 and 1937? Well, I don't remember any particular job right now.

Q. As a matter of fact, it was your policy and intention, so far as you could, to make your delivered prices the same as your competitors during that period, wasn't it?

A. No, it was—

Q. Why can't you cite me some cases?

A. It was our policy to get all the money we could for our cement, however.

Q. Why can't you cite me some cases where you did otherwise than that during that period?

A. I do not remember at this particular moment.

Q. When you say it is your policy to get all you can for your cement, do you mean you want to get just as

37365 much at destination as your competitors?

A. I want to get as much as I can. I would be willing to get more than my competitors, if I could.

Q. But you want to get as much as your competitor at destination?

A. I want to get just as much as we can.

Q. And you do not want to take any less?

A. I never want to take less if we can get more.

Q. Wouldn't you say that there was considerably more price competition in your business in 1931 and 1932 than there was after 1932?

A. Well, it has been—breaks out more prevalent at times than others. During 1931 and 1932 it was pretty bad, and it has been spotty since.

Q. When you say it "breaks out," you mean price competition breaks out?

A. I mean it is worse at times in spots than other times.

Q. In other words, you have more price competition some times than others; is that right?

A. Some times more than others.

Q. And 1931 and 1932 were instances of that sort?

A. Well, it was particularly bad at that time.

Q. In other words, it was not just scattered instances, but the whole period was bad; is that what you mean?

A. Well, most of the period was bad.

37366 Q. When you find some of these alleged secret price cuts reported to you by contractors, why is it that that lower price does not make the market there?

A. Well, I think sometimes it does, Mr. Wooden; other times it does not.

Q. What determines whether it does or does not?

A. The desire of some company to make the price effective, or not.

Q. Do you mean to make it effective openly?

A. Well, I think that I have seen that done.

Q. I beg your pardon. I did not get your answer.

A. I have seen that done, yes.

Q. But in the cases of the two Lehigh cases that you mentioned, where you did not meet it, of course that alleged lower price there did not make the market?

A. Well, I do not know whether any other companies met it, or not. We did not.

Q. Well, wouldn't you have known it if the others had met it?

A. We might have found it out.

Q. Now, with regard to this change in the bulk differential from ten to five cents, you said that occurred in 1932?

A. Yes, sir.

Q. Didn't that occur shortly after the substantial increase in price in July, 1932?

37367 A. The first I saw, Mr. Wooden, was a bid I made up myself and filed with the Indiana Highway Commission.

Q. But wasn't it shortly after July, 1932?

A. No, it was before.

Q. How do you fix the time?

A. I fix the time because the price of cement was extremely low at the time, and that was my reason for only allowing five cents per barrel differential.

Q. Did you do it before any others?

A. Yes, as far as I know, it had not come to my attention that any other company had done it before that.

Q. You could not have made it effective by yourself unless others had followed you, could you?

A. No, sir.

Q. What would you say if I were to suggest that the record shows it was August, 1932, when that change in differential was made.

A. Well, if the record shows that my bid was filed in August, why, it would show that.

Q. I did not say that.

A. I do not believe it shows my bid was filed in August. It may have been '31.

Q. I do not know whether your bid is in evidence on that point, but do you still say that it was made prior to any increase in price you made?

A. That is the reason I say that, is that because
37368 our prices were very low at the time I filed that bid, and that is the way I had it in my mind.

Q. They were still very low, from your point of view, even after that increase in July, 1932, weren't they?

A. Yes, but not near so low as they were before.

Q. At any rate, you agree that you could not have made your change in the differential from ten to five cents unless competitors went along with it?

A. Well, as I remember, some of the competitors did not go along with it for a while.

Q. But it stuck, didn't it?

A. Eventually it got to be the custom.

Q. Can you tell me just when your Sugar Creek mill became a base, and when it was discontinued as a base? At various times you said it was sometimes a base and sometimes not.

A. It was a base when I—a so-called base when I came with the company.

Q. In 1930?

A. Yes, sir.

Q. All right. When did it cease to be a base, first, after that?

A. I believe it was in 1933.

Q. And then did it become a base again?

A. Yes.

Q. When?

37369 A. Well, I think it was either late in 1937 or early in 1938, Mr. Wooden.

Q. From 1933 until 1937 it was not a base; is that right?

A. For a period of about 4½ years.

Q. How did it—what were the circumstances under which it ceased to be a base?

A. In 1933 we picked up quotations of the Lone Star Company in the vicinity of Kansas City and Bonner Springs which reflected a price increase, and we followed their prices and did not establish prices which reflected a base at Sugar Creek.

Q. Well, if your base at Sugar Creek had continued in effect it would have prevented that increase in that neighborhood by Lone Star, wouldn't it?

A. Not if we increased—not if we followed the increased prices.

Q. I am saying—

A. If we had not followed the increased prices, why, their prices would not have stuck whether we had a base or did not have a base.

Q. You took that occasion to cease using Sugar Creek as a base?

A. Yes, sir.

Q. And when was that?

A. That was in 1933.

37370 Q. What time in 1933, was it, July?

A. I believe it was about the middle of the year; yes, sir.

Q. That also made a substantial increase in your prices at Sugar Creek, didn't it?

A. The increases that we found in the field—the increase that we found in the field was about 25 cents a barrel increase, I believe.

Q. What amount of change did that reflect in your price delivered in Kansas City?

A. Well, do you mean, Mr. Wooden, as compared to what?

Q. Compared to the previous level.

A. That would affect the price in Kansas City, as I remember, about 28 cents a barrel; the 25 cents being the increase which Lone Star had broadcast.

Q. Did you have a freight advantage over Lone Star into Kansas City?

A. Very slight freight advantage.

Q. How much?

A. About a cent and a half per hundredweight, I believe.

Q. About, in all, six cents a barrel?

A. Well, at some destinations; at others not that much.

Q. Were you the first one to make a reduction in prices early in 1931 in your territory?

A. We were the first ones in our territory to reduce prices; that is, our current market prices.

37371 Q. And, as I understand it, that was simultaneous with your bids on Missouri highway requirements in January, 1931?

A. The first reduction was made in February after the Missouri Highway Department had received bids in January.

Q. And that was how much?

A. Twenty-five cents per barrel.

Q. And that was made not only to the Highway Department but to your dealer trade?

A. Yes, sir.

Q. And was there another one initiated by your company in March, 1931?

A. Yes, sir.

Q. How much was it?

A. It reduced our prices about 16 cents a barrel, I believe.

Q. That was something—

A. That was generally; it would vary a little, Mr. Wooden.

Q. That was something your company had never done before, wasn't it,—initiate a price reduction?

A. I do not know what they had done before; I had not been with them but since January 1, 1930.

Q. But not during your connection with the company, they had never done it?

A. During the year previously they had not made any.

Q. In other words, during the year 1930 they had not made any?

37372 A. They had not made any general price reductions.

Q. Had they made any reduction on State Highway bids?

A. Yes, in 1930 we made some prices that were less than our current market prices on Missouri Highway requirements to meet the prices of a competitor who had filed a lower bid than we had.

Q. Who was that?

A. That was the Marquette Company, I believe.

Q. Did the Lone Star Company meet your reductions in Missouri Highway bids, or who was it that met—

A. Well, the Universal-Atlas Cement Company met our reductions, and the Alpha Portland Cement Company met our reductions, and Marquette Cement Manufacturing Company met our reductions.

Trial Examiner Norwood: Is that where they were permitted to do so after the bids were opened?

The Witness: Yes, sir.

By Mr. Wooden:

Q. Were your general reductions to the dealer trade also met?

A. Yes.

Q. By whom?

A. Well, they were met by all of our competitors, as I remember it. They all continued to solicit business in that vicinity.

37373 Q. And then, again, I understand, in October, 1931, you made a further reduction in your prices to the Missouri Highway Commission?

A. Yes, sir.

Q. And how much was that?

A. It was not with any uniformity. It varied at various destinations; the largest reductions being made at the points where the larger jobs were located, Mr. Wooden.

Q. In other words, in that bidding you were not quoting at certain destinations the equivalent of any base price plus freight to those destinations; is that correct?

A. That is correct.

Q. You were quoting at less than the equivalent of any base price plus freight; is that right?

A. We were quoting at considerably less than our current market prices. However, we reduced our current market prices following that bid.

Q. Well, when you reduced your current market prices you made a general reduction applicable everywhere, didn't you?

A. Yes.

Q. In October?

A. Yes.

Q. And how much was that?

A. Well, there had been several reductions between our March bid and October. Our prices continued to decline from the time we bid in March until October, and
37374 then we reduced them further in October. I think the total decline was something like 30 or 40 cents a barrel during that period.

Q. Do you mean to say, Mr. Alexander, that during the time that you were making these substantial reductions in 1931, that you had no complaints come to you from any of your competitors about what you were doing?

A. No, I do not believe any of them ever said a word to us about it.

Q. As far as you know, all they did was just meet you?

A. Or try to beat us.

Q. Did they do that?

A. Well, I think there were some occasionally on some work.

Q. That was a period, was it not, when there was a great uncertainty as to what the delivered price was at any given time at any particular destination, wasn't it?

A. Well, the market—our general market was going down so rapidly that there were changes from week to week or month to month.

Q. Well, wasn't there a great uncertainty at any particular time what the delivered price was at any particular point?

A. Well, we—I don't know that there was any more than there generally is. The price level just continued to fall. I do not know that there was any more uncertainty than usual.

Q. Well, wasn't there considerable uncertainty at those destinations where you made special prices because
37375 of the volume of business on Missouri highways in October, 1931?

A. I do not know whether there was uncertainty or not. We were endeavoring to get the business, and we bid it pretty low.

Q. And you bid lower than your dealers' price at those points?

A. Yes.

Q. And your competitors bid what,—the regular dealers' prices at those points?

A. I think some of them did, and, as I remember, some of them bid less, but we were low bidder on practically all the requirements.

Q. What was there in the conditions of supply and demand for cement in the summer of 1932 that enabled you to increase your prices at that time?

A. I do not think that we took supply and demand into account. We were desperate and making an effort, sending up a trial balloon to see if we could increase them.

Q. You could not hope to do anything unless your competitors followed along with your lead?

A. We would not have been able to maintain the prices long unless our competitors had followed them along.

Q. Why did you start it at Sugar Creek in June, and then not put the price up at Prospect Hill until July?

A. We made up our minds that we would try an 37376 increase in price in the vicinity of Sugar Creek and see if they would stick, and if they did we would try to raise them at the other plant.

Q. Well, why did you take Sugar Creek first?

A. There was no particular reason why we took Sugar Creek first.

Q. Well, do you mean you shook Sugar Creek and Prospect Hill up in a hat, and took Sugar Creek just because it happened to come out?

A. I did not say that.

Q. Or didn't you have any reason for trying Sugar Creek first?

A. I do not think we had any particular reason.

Q. Were you then giving advance notice of increases?

A. Well, as I remember it, we sent those quotations out effective immediately.

Q. You could not do any business on that immediate increased price, could you, until your competitors were willing to let you?

A. No, and we did not.

Q. Well, why did you make them effective immediately?

A. Well, we were very anxious to get the price up.

Q. Whether you did any business at the price or not?

A. Well, we were better off with the prices up and not doing business than we were doing business at the
37377 prices we had in effect prior to the time we sent out the quotations.

Q. And how long was it before you did any business at the new prices?

A. Well, we did very little business for some 15 or 20 days.

Q. In other words, you did not do any business until your competitors came up?

A. As long as they were willing to sell for less we were not doing any business to speak of.

Q. Why was it that your company made it a condition of its rejoining the Portland Cement Association that the Marquette Company come back into it?

A. Because the Marquette Company was one of our major competitors, and enjoying the business in the same territory that we were endeavoring to get business in, having a mill north of us and a mill south of us.

Q. The Marquette Company had been also very active in cutting prices, too, hadn't they?

A. I do not think they had been any more active than some of the others.

Q. But it had been very active?

A. Well, I presume that they were trying to sell cement like some of the others of us were at that time.

Q. But cutting prices?

A. Well, we heard that they did at times, and I believe some of their bids reflect it—with the highway de-
37378 partments—prices lower than the general market prices.

Q. Do you mean lower than the equivalent of base price plus freight?

A. Well, in some instances it would have been such prices and in other instances it would not have been.

Q. In some instances it would have been that equivalent and in other instances it would not?

A. That is right.

Q. In instances it would have been less than that equivalent?

A. Well, either less or more.

Q. Well, can you explain why a concern should make a delivered price more than the equivalent of base price plus freight?

A. I presume they could make any kind of a price they wanted to, as long as anybody did not underquote it.

Q. Well, have you sometimes done that, made your price higher delivered than the equivalent of base price plus freight?

A. Yes, we have.

Q. For what reason would you do that?

A. Because we wanted that price for our product.

Q. Have you sometimes done it as an automatic means, you might say, of stepping out of that particular market and letting somebody else have a little?

A. No, sir.

Q. It would have that effect, wouldn't it?

37379 A. No, sir.

Q. Do you mean you could get more delivered there than the others?

A. No, I did not mean that at all, unless they would quote a price, as high as ours, why, we could not.

Q. Yet you say you deliberately quoted higher than they.

A. I did not say that we deliberately quoted higher than they.

Q. Didn't you say you had sometimes intentionally quoted delivered prices that were lower than the equivalent of base price plus freight?

37380 A. I said we had quoted prices that exceeded base price plus freight at times.

By Mr. Wooden:

Q. Didn't you know that they exceeded it when you quoted it?

A. Yes.

Q. Then we are just back where we started a few minutes ago. I asked you why?

A. Because we wanted that price for the cement.

Q. But also you did not want that business?

A. We certainly did.

Q. You did not expect to get, did you, when you deliberately quoted high?

A. We certainly did, and have gotten lots of it.

Q. You say, then, it is possible to get business at a higher delivered price than your competitors?

A. I did not say that.

Q. You said you had done it.

A. No, I did not.

Q. Do you mean that your competitors also quote above the equivalent of base price plus freight?

A. Yes, I have seen them do that.

Q. And quoted the same amount above that equivalent as you do?

37381 A. They have either followed prices that high, our market prices, or we followed theirs; or something of that kind.

Trial Examiner Norwood: Wasn't that the equivalent to raising your base?

The Witness: No.

Trial Examiner Norwood: For the time being?

The Witness: No.

By Mr. Wooden:

Q. Can you give any instance in which that was done?

A. Yes.

Q. Will you?

A. Yes.

Q. All right.

A. We quoted prices that way in the metropolitan St. Louis area all the time.

Q. Any other places?

A. I do not believe we quoted that way any other place.

Q. In other words, there is a special arbitrary delivered price; that is what it is?

A. Well, you may call it arbitrary if you wish. It is a price that we established as our market price in St. Louis.

Q. Did you do it, establish it, or did Alpha establish it?

A. We do not think it is arbitrary.

Q. Did you establish it first, or Alpha?

A. We did.

37382 Q. Was it established before you came with the company?

A. There has always been a flat price ever since I have been with the company in the St. Louis metropolitan area, and it has no relation to freight rates or mill bases.

Q. I say, was it in effect when you came with the company?

A. Yes.

Q. Is that why you prepay the freight to destinations in the St. Louis County?

A. No.

Q. Why is it?

A. Well, we do not prepay the freight to all destinations in St. Louis County.

Q. Is that why you prepay the freight to some destinations in St. Louis County?

A. No. Some of the destinations we prepay freight to in the switching district of St. Louis; we pay it because the tariffs provide for prepayment.

Q. In other words, you prepay it in St. Louis County where the tariffs require it; is that it?

A. I do not say that. I said St. Louis.

Q. All right. You prepay the freight in the St. Louis switching district where the railroads require it; is that correct?

A. We do; and we prepay it at some destinations outside of the St. Louis district where the tariff did not require it.

37383 Q. But so far as the St. Louis district is concerned, the railroads require you to prepay the freight?

A. That is right, in the switching district.

Q. Yes, and there are a number of other stations, are there not, outside of the St. Louis switching district where the railroads require you to pay the freight?

A. Not in the immediate vicinity of St. Louis.

Q. No, but in your sales territory generally?

A. Very small towns, where they do not have a station agent.

Q. Are those the only places where they do not require prepayment?

A. Yes, I believe so; the only places.

Q. I mean, are the only places where they do require prepayment, the small towns?

A. I believe so, Mr. Wooden.

Q. Do you prepay freight in the Memphis Metropolitan district?

A. Yes.

Q. Do the railroads require it there?

A. The railroads require prepayment of freight on switching movements, and there is a switching movement from the Marquette silos in Memphis, and we have always prepaid freight to meet that competition.

Q. In other words, you mean that because the railroads require Marquette to prepay freight from their silo, that you therefore prepay freight?

37384 A. We would prepay freight to have as favorable terms as they would have.

Q. The railroad does not require you to prepay that freight?

A. No.

Q. In other words, you do just what they require Marquette to do?

A. No. We do what was necessary to get the business. I do not believe the customers would be very favorable to giving us orders and paying the freight on them in Memphis when they are able to get cement delivered in Memphis and have it prepaid.

Q. Why was it, Mr. Alexander, that you did not make these increases in price that you did make in the summer of 1932,—why didn't you make them sooner?

A. Well, we had been reducing our prices down through October, 1931.

Q. Yes.

A. And after we began to see how much money we were losing, why, we began to change our minds about reducing prices and decided that we should try to increase prices.

Q. You did not do that until the summer of 1932, a year after the reductions?

A. Well, we were having increasing losses, and it was beginning to have quite an effect on our policy.

37385 Q. I would like to ask, Mr. Alexander, you changed your policy, did you not, from a policy in 1931 of making price reductions in order to increase your business to one of making price advances, didn't you?

A. We reduced prices during 1931, and found that we secured little additional business, but heavy losses, so we began to get pretty serious about the matter, and finally decided to try and get higher prices for our cement.

37386 Q. That represented, you might say, almost a complete about face in policy, didn't it?

A. Yes, it did.

Q. Now, you testified that you continuously ran into instances of more favorable terms and discounts being given by your competitors than your own. Can you give any specific instances between 1933 and 1937?

A. Yes, I think so. The jobs that I mentioned about having better prices, contractors that I mentioned who advised us they were securing lower prices than the prices that we were quoting also advised us they were receiving more favorable terms.

Q. In addition to more favorable prices?
A. Yes, sir.
Q. Not more favorable terms?
A. No; in addition.
Q. In addition?
A. Yes, sir.
Q. Any more instances?
A. Yes. The Atkinson Paving Corporation also advised us that they were being offered more favorable terms than ours.
Q. And when was that?
A. During 1934 and '35, and they advised us that they were being offered more favorable terms in 1936.
Q. Did they say who was offering them?
37387 A. We did not ask them who was offering them.
Q. Did they say just what terms were being offered that were more favorable?
A. They claimed that they were able to buy cement and take their discount when they secured their estimate checks, as compared with our terms of payment within 15 days from date of invoice.
Q. Can you name any competitors whose published or announced terms of sale and discounts have been different from yours?
A. Well, the Lehigh terms announced in 1930
37388 were different from ours.

By Mr. Wooden:

Q. Can you give any other instances?
A. Subsequent to that date most of the published terms that I recall provided for 10 cents per barrel discount for payment within 15 days from date of invoice.
Q. In other words, you mean to say by that that the published terms of sale and discount have not been different since between your company and others?
A. I means to say by that, that is the terms that are generally published by most competitors in our area. I am not informed about the terms outside of our area. I heard they have different terms out West.
Q. Yes. Your competitors in your area.
A. Yes.
Q. The published terms and discounts are the same.
A. Most of them are—rather, those we picked up were 10 cents per barrel cash discount for payment within 15 days.

Q. Can you specify any of your competitors in any respects in which their published terms of sale and discount have differed from yours?

A. I have not picked up any of the terms of—our company has not picked up in the field any published terms of our competitors other than the basis that I have described.

Q. And which are your bases?

37389 A. Our basis is 10 cents a barrel for payment within—

Q. You have not picked up any published terms of sale and discount of your competitors that are any different from yours?

A. Well, I did not say that.

Q. I am trying to find out what you mean.

A. I tried to be very clear.

Q. Well, will you answer the last question.

A. We have not picked up any published—any of our competitors' terms that were more favorable than ours.

Q. Have you picked up any of your competitors' published terms and discounts that were any different from yours?

A. I don't know if they differ in all respects, but as far as the 10 cents per barrel discount for payment within 15 days they are the same as far as the—the same in that respect.

Q. Can you specify any respect in which they have been different?

A. I say I have not noticed any.

Q. Did you meet this, what was the Atkinson case, where your information was they had more favorable discounts or terms?

A. We did on one or two occasions, and one or two occasions we did not.

Q. Did you say when that was?

A. Well, that was during '34 and '35 and '36 in the State of Missouri.

Q. Did you say that the discounts and terms of

37390 sale that were discussed in the trade, and as a result of the discussion incorporated into the N. R. A. Code, did not represent any agreement on terms and discounts?

A. Did not represent any agreement as far as our company is concerned.

Q. Did you attend any of the meetings at which they discussed what should be included in the N. R. A. Code?

A. I do not remember attending any meetings during which the Code was being prepared. It may be that I attended some. I do not remember attending.

Q. You attended the meeting, did you not, at which the Compendium of Trade Practices was approved by the board of directors of the Institute?

A. I may have. I do not remember.

Q. Didn't that Compendium contain discounts and terms of sale?

A. I do not believe I ever read the Compendium, Mr. Wooden.

Q. If it did contain discounts and terms of sale, you would not consider that that represented any meeting of the minds on the part of the directors who approved it?

A. I would not consider that it meant anything more than the general practice had been in the trade for eight or ten years.

Q. As a matter of fact, weren't some of the discounts and terms of sale somewhat different under the Code from what they had been before?

37391 A. Well, I do not believe they were; not to my memory.

Q. Was your practice in regard to discounts and terms of sale the same as the provisions regarding such subjects in the Code?

A. Well, I do not remember the provisions in the Code or terms, but the terms that I have described as being our terms have been in effect since 1931.

37392 Q. This period when prices were going down in 1931, discounts and terms of sale of your company remained the same?

A. After we established the discounts and terms, I believe it was in 1931.

Q. What time in 1931?

A. Well, it was around May, I think, April or May.

Q. Prior to that time they were different from what they were after that time; is that right?

A. Our terms prior to that time provided for an additional discount to dealers at the time invoices were paid.

37393 Q. And afterwards?

A. It did not provide for that.

Q. You recall any discussion at the meeting of the board of directors at which the Compendium was adopted?

A. No, I do not recall any discussion. I am not sure that I attended the meeting.

Q. The minutes, I believe, that are in evidence show your attendance. You do not remember anything about the discussion?

A. If the minutes show that, I do not doubt that I was there.

Q. Can you point out any difference between your discounts and terms of sale, and what was provided for in the N. R. A. Code and in the Compendium?

A. I say I do not believe I have ever read the Compendium. I do not remember the terms in the N. R. A. discount—N. R. A. Code, but they probably were ten cents a barrel discount for paying within 15 days.

Q. I believe you said that you discontinued the dealers' discount because you believed it would improve your company's status or standing with the dealer; is that right?

A. Yes; we felt that it might profit our company some.

Q. As a matter of fact, there wasn't very great opposition and reaction among dealers to the discontinuance of the dealer's discount?

A. Well, I do not believe I understand your question.

37394 The Witness: Do you mean by that question, were they unfavorable to it, or favorable to it?

By Mr. Wooden:

Q. Weren't the dealers opposed to the discontinuance of the dealer's discount?

A. Not our dealers. They were not opposed to it. In fact, I think they had quite a contrary view.

Q. There was no time at which you remember any dealers opposed to it?

A. My memory does not serve me in connection with any opposition that we ran into with respect to eliminating the discount.

By Mr. Wooden:

Q. Do you recall any opposition on the part of dealers and dealers' associations to the Lehigh plan because it cut the dealer's discount and deferred the payment of any discount?

A. Well, I think that some of our dealers ex-
37395 pressed themselves as not being very favorable to it—to the Lehigh plan.

Q. You discontinued the dealer's discount, I take it, after some of your competitors did so. You followed their lead, or did you lead off?

A. Well, we discontinued our dealer discount after the Lehigh plan had come out, but I believe before the Lehigh Company discontinued their dealer discount.

Trial Examiner Norwood: You say you discontinued after the Lehigh plan had come out?

The Witness: Your Honor, we discontinued our dealer discount after the Lehigh plan of late autumn of 1930.

Trial Examiner Norwood: Yes.

The Witness: It was in the hands of the dealers—the announcement.

Trial Examiner Norwood: What was that announcement? Was that announcing the discontinuance?

The Witness: It was announcing a new plan by which they retained 5 cents per barrel so-called dealer's discount and gave it to the dealer at the end of the year.

By Mr. Wooden:

Q. As a matter of fact, didn't you find your dealers much more favorable to your continuation of the dealer's discount than to the Lehigh plan?

A. I do not believe our dealers compared the two. I told you before that I think our dealers were favor-
37396 able to no dealer discount.

Q. And they never changed their position; they were always favorable to no dealer's discount?

A. To my knowledge, we had no complaints about the discontinuance of the dealer's discount.

Q. My question was whether or not the attitude of the dealers favorable to discontinuance of the dealer's discount was always the attitude of the dealers, or whether it changed.

A. To my knowledge, none of our dealers have expressed themselves to us as being favorable to a dealer's discount.

Q. And you have no knowledge that dealers in the trade anywhere in your sales territory favored the dealer's discount as against no discount?

A. I do not believe that—

Q. At any time?

A. I do not believe that we paid any attention to those who took such a position.

Q. Is it your view, Mr. Alexander, that sales expense per barrel is just the same on a contract, let us say, that embodies a hundred thousand barrels as though it were on a contract that involves, say, a thousand barrels?

A. It is my view, Mr. Wooden, in answer to that question, that to remain in the cement business it is necessary to have a sales department, salesmen, and sales offices, and telephones, and so forth, and traveling expenses,
37397 and automobiles, and I do not believe that you could dispense with any part of those requirements because you would happened to get an order for a hundred thousand barrels.

Trial Examiner Norwood: Now—

Mr. Wooden: Well, I would like to finish this particular subject. It won't take me but a moment.

Trial Examiner Norwood: All right.

By Mr. Wooden:

Q. You mean, then, that it is necessary to average your sales expense over all your business?

A. I mean it is necessary for us to maintain a sales department, and we can't dispose of any part of it because we happen to get a few good-sized orders.

Q. But that is not my question.

Do you contend that the sales expense to handle a hundred thousand barrel order is just the same as to handle a thousand barrel order?

A. I did not say I contended that.

Q. Well, what is your position?

A. I explained it as clearly as I could.

Q. You do not contend that the sales expense is the same on those two types of orders?

A. I contend that our sales expense, total sales expense in dollars and cents for our company will run about the same, whether we have the big order or do not have
37398 the big order, because we can't let anybody go, or give up our offices, or cut off our telephones, and so forth.

Trial Examiner Norwood: In other words, your sales expense is an overhead; is that right?

The Witness: Yes, sir.

By Mr. Wooden:

Q. All of which means, doesn't it, that you consider it necessary to consider your average sales expense?

Mr. Brick: Oh, I object to that. That is argumentative.

Trial Examiner Norwood: Objection overruled.

A. We do not call it an average; we call it a total sales expense.

By Mr. Wooden:

Q. Well, but this total sales expense is divided among your total sales to get the average per barrel?

A. If we attempted to arrive at the average sales per barrel, we would take the total sales expense and divide the barrels into it.

Trial Examiner Norwood: Is that the way you estimate sales expense?

The Witness: Well, we have not estimated sales expense.

37399 Washington, D. C.,
April 25, 1940.

37400 M. MOSS ALEXANDER thereupon resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Wooden.

Q. Mr. Alexander, what is the most recent instance in which the Missouri Company has submitted any bids to the Federal Government?

A. I believe we bid on two or three cars for the Agricultural Department early in 1937.

Q. Nothing since then?

A. No, sir.

Q. Can you give any specific instances where your company made sales direct instead of through dealers
37401 on W. P. A. business between April, 1935, and July, 1937?

A. No. I did not testify that our company had sold any W. P. A. business direct.

Q. Can you give any specific instances during that period when your competitors did so?

A. Yes. There was quite a little W. P. A. work sold direct in the State of Arkansas, and quite a little bit in Memphis, Tenn., and the vicinity of Memphis, Tenn.

Q. Well, can you specify the competitors who did sell it direct, and describe the jobs during that period?

A. I do not believe I could describe the jobs, but I believe the Pennsylvania-Dixie Cement Corporation was one that was quoting direct on some of the business, and I believe that Universal-Atlas Cement Company quoted direct on some of it, and it seems to me that Lehigh Portland Cement Company quoted direct on cement.

Q. Wasn't there a dispute at times as to whether certain W. P. A. business was within the category of what might be sold direct, and certain other business, W. P. A. business, a dispute about whether it should be sold through the dealer?

A. No dispute.

37402 Q. Wasn't there some contention or differences of opinion about whether some business should be sold direct to W. P. A. and other business sold through the dealers?

A. Contentions or differences of opinion between whom, Mr. Wooden?

By Mr. Wooden:

Q. Between anyone, that came to your attention, and then you can tell who it was.

37403 A. I have known of no disputes about W. P. A. business.

By Mr. Wooden:

Q. You have known of no differences of opinion on the interpretation—

A. There has been no difference of opinion in our company about the matter.

Q. Do you recall the circumstances of the bids on some W. P. A. business—showing you Commission's Exhibit 415-366, 367. Does that recall or refresh your recollection as to whether certain business should have been sold direct, or not, involving your company?

A. Yes. I remember this instance.

Q. Didn't that involve the question as to whether that business should have been sold direct, or through the dealer?

A. This involved an instance where the quartermaster has advertised for some cement, and after securing the bids we learned that the quartermaster was pur-

37404 chasing the cement for the W. P. A. It was our opinion that we wanted to quote W. P. A. through the dealers, and we were not sure that the purchasing department, Procurement Division, was familiar with this particular situation, where the quartermaster was making purchases and turning it over to W. P. A.

Q. In other words, if the quartermaster's department had bought the cement for its own use rather than for W. P. A. purposes, why, then, it would have been all right to sell it direct; is that right?

A. It was the custom of our company to sell the War Department; yes, sir.

Q. And this sale was to the War Department, but the only point was that they used it to construct a calvary school for the War Department with W. P. A. labor, isn't that right?

A. Well, I did not know that detail, but I knew they turned it over to the W. P. A.

Q. Do you recall in that connection efforts on the part of Mr. George Reiter to get the Procurement Division to indicate in every case whether or not the cement was to be used on W. P. A. jobs?

A. No, I do not recall that. I recall that Mr. McArdle wrote Mr. Reiter and asked him if he had informed Captain Collins of this particular situation. I do not recall any other activities. There may have been some.

Q. Had your Mr. McArdle once been secretary 37405 of the Mississippi Lumber Dealers' Association?

A. No, sir.

Q. Was he formerly with the Universal-Atlas Cement Company?

A. Yes, sir.

Q. As sales manager?

A. Yes, sir.

Q. Is that Mr. McArdle's signature on Commission's Exhibit 576-6-T?

A. That looks like his signature.

Q. All right. You are familiar with his signature?

A. Yes.

Q. You were a member of the board of trustees of the Institute, were you not, during 1935?

A. I believe I was.

Q. Do you recognize the names appearing at the head of Commission's Exhibit 832-G, as being your fellow trustees on that board, including yourself?

A. Well, I do not remember all of them. I believe that some of them were—I am not sure who else was on at that time, but I do not believe that all those people were.

37406 I do not believe Mr. Scott was on, but I do not believe—I would not be sure about that, however, Mr. Wooden.

Q. You really are not sure about any of them, as a matter of fact, are you?

A. Yes. I think that Mr. Lucas was on. I believe he was.

Q. Is that the only one you can remember of as being on the board during your—

A. It seems to me Mr. Condon was a member, too, and I believe Mr. Porter, too; I do not remember for sure that the others were.

Q. Do you remember receiving a copy of that document, Commission's Exhibit 832-G?

A. No, sir; I do not remember of ever receiving it.

Q. Do you know who Mr. Chaffee, mentioned in the document, who he was?

A. I have heard the name, but I have never met the gentleman.

Q. Did you ever have any contacts with him by correspondence?

A. I do not remember of any. I may have had, but I do not remember.

Q. You do not know whether others in your company may have had?

A. I do not believe they ever did, Mr. Wooden. I think he was an eastern man.

Q. Now, Mr. Alexander, will you specify wherein

37407 the sales policies of the Missouri Portland Cement Company have been different from the sales policies of your competitors up to July, 1937?

A. I believe I testified that our sales policy had been more or less flexible, and that he had sold both large and small concrete products companies direct when their credit permitted; wherein, some of our competitors had a policy of selling only the larger ones direct.

A. (Continuing.) I think I also testified that we sold State highway work direct even though it was within the city limits. We have sold certain—

By Mr. Wooden:

Q. Now, will you specify wherein that differed from the sales policy or contracts of your competitors, naming the competitors and the time.

Mr. Brick: Now, if Your Honor please, may I object to Counsel interrupting an answer for the purpose of propounding a new question, until the previous question has been answered?

Trial Examiner Norwood: Have you finished your answer?

The Witness: No.

37408 Trial Examiner Norwood: Let him finish his answer.

The Witness: If I may repeat, we have sold work to the State Highway Department direct in towns and villages, within the corporation limits of towns and villages where some of our competitors have sold only that work located outside of the city limits of towns, and—

By Mr. Wooden:

Q. Will you state who they were?

Mr. Brick: There is another instance of interruption.

Mr. Wooden: I want to finish the one subject.

Trial Examiner Norwood: I do not think— Is that a satisfactory answer to the previous question?

Mr. Wooden: So far as it went. I am just following it up by asking him to state who the competitors were that had this other policy.

Trial Examiner Norwood: Go ahead.

The Witness: Do you want me to complete the first question, or the answer, or answer that second question?

By Mr. Wooden:

Q. I want to complete this particular topic before you go on to another topic. I will give you plenty of opportunity to take up other topics.

Mr. Brick: Let's do it, Mr. Wooden, one question at a time.

37409 Trial Examiner Norwood: I will ask the witness now to make direct answers to these questions.

A. I do not know of any of our competitors who have sold State highway work direct within the city limits with the exception of the Alpha Company. I believe they have sold some that way.

By Mr. Wooden:

Q. All right.

Now, take up prior to July, 1937.

A. I am talking about prior to July, 1937.

Q. Now, can you specify wherein any other of your sales policies have been different from those of competitors, naming the competitors, describing the sales policy?

A. I think most of our competitors sold ready-mix plants for delivery to their regular established places of business, and not for re-sale. We make no restrictions, and have made no restrictions on the re-sale, and we have also sold ready-mix concrete companies who set up equipment to service individual jobs for delivery that was not to their regular established places of business.

We also sold some large building jobs direct where, within the city limits, where the contractor had the facilities for handling the materials, and it did not appear that the dealer could render any valuable services in connection with the construction.

37410 Q. And right in the same community your competitors were selling through the dealer?

A. That is true. I am speaking specifically of the Federal Courthouse in St. Louis.

Q. You are speaking especially of St. Louis, did you say?

A. I am speaking of one large job that I testified to on direct, referring to the Federal Courthouse in the City of St. Louis.

Q. You have just that one job of that sort in mind?

A. Well, I think that—that is probably the largest building job I have in mind. I have in mind that we sold municipal work and State highway work direct in Memphis, Tenn., market, particularly the larger jobs, where it did not appear the dealers could render any valuable service.

Q. And at the same time competitors were selling only through the dealers in that market to that same type of job?

A. I think one or two of our competitors met our competition. I believe the Marquette Company sold some of the contractors the same way that we were selling. I do not believe the other companies met that competition.

Q. The attitude of your dealers in various territories differs, does it not, towards such things?

A. Yes.

Q. In other words, in some territories dealers are satis-

fied to have certain business sold direct, and in other
37411 territories dealers will object to that same business being sold direct; isn't that true?

A. Well, dealers generally would like to have all business shipped through them—

37412 Q. Now, will you make a direct answer to my question, Mr. Alexander?

Mr. Brick: Oh, well, that is direct, Mr. Wooden.

Mr. Wooden: Oh.

A. I believe all of our dealers would like to have us to make the sales of cement to them, and they in turn sell it to the contractors, but in some territories that feeling seems to be more acute than in others.

By Mr. Wooden:

Q. In other words, in some territories the dealers object and in other cases they do not say anything about it, although they would like to have it all?

A. I did not say that.

Q. Isn't that the fact?

A. No.

Q. Well, what is the fact?

A. I have tried to explain the fact. The facts are that all of our dealers would like to have all of the business.

Q. Yes. You have said that three times now.

37413 I am asking you if it is not a fact that in some of your territories the dealers object to your selling certain business direct, and in other territories the dealers did not object to your selling it direct.

A. I do not know of a sale we have ever made direct that dealers have not objected to.

Q. In other words, there is no territory in which you could make sales direct without objection on any type of business?

A. I do not believe that the dealers generally object to selling a State highway department's work direct, where it is outside the city limits. If it is in the city limits, why, they are looking for the business usually.

Q. You testified that your criterion generally, whether you sold direct or not or through the dealer, was whether the dealer performed services. What service does the dealer perform on carload shipments that you make direct to W.P.A. jobs?

A. Well, in our territory in most cases he unloads the cement and delivers it on the job.

Trial Examiner Norwood: A little louder, please.

A. I say, in our territory in most cases he unloads the cement from the cars and delivers it on the job.

By Mr. Wooden:

Q. In the cases that he does not do that, and where the car is shipped directly to the job from your mill, what service does the dealer perform?

37414 A. In some cases the dealer stores the cement for the W.P.A. and furnishes trucks to the W.P.A. for delivery.

By Mr. Wooden:

Q. You have sold and shipped direct from your plant to a W.P.A. job, have you not?

A. I do not remember of any. We haven't sold very much W.P.A. cement, Mr. Wooden.

Q. All right. What did you mean by saying "in most cases" the dealer handled it?

A. Well, I had in mind particularly the business—about the only place that we have sold any W.P.A. shipments is in the St. Louis district, and there I believe that practically all of it has been delivered on the job by dealers' trucks; that is what I had in mind when I said "most." I did not want to say that every car had been so handled.

Q. You testified on page 37220 that the board of

37415 trustees nor any of its members had ever made any effort to determine or influence the marketing policies of any of the members of The Cement Institute.

Did you have in mind there, or did you take into account in making that answer the adoption by the board of trustees of the Compendium of Trade Practices?

A. Well, of course, there was nothing compulsory about the Compendium, to my knowledge.

Q. Well, did you consider it an effort to influence the marketing policies?

A. I certainly did not.

Q. You did not.

You were present at the meeting at which that Compendium was adopted, weren't you?

A. You say the minutes so show. I have not contested it.

Q. According to Commission's Exhibit 624-B, the minutes of that meeting, you were present.

A. I told you that if the minutes showed I was present, that I was willing to say that I was probably present.

Q. You do not have any recollection, I believe you testified yesterday, about the adoption of that Compendium.

Mr. Brick: I object to that.

Mr. Seeley: That was not the witness' testimony, Your Honor.

Mr. Brick: It is not only not the witness' testi-
37416 mony, if Your Honor please, but there is nothing in the record showing the exhibit to which Counsel has referred does not show an adoption.

Trial Examiner Norwood: Now, read the question.

Mr. Brick: I think that is something—

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: I think you may ask the witness the facts about the matter.

Mr. Wooden: Mr. Brick has made a statement on the record I want to call him on.

Trial Examiner Norwood: Go ahead.

Mr. Wooden: He made his statement notwithstanding these minutes; Commission's Exhibit 624-E has a paragraph as follows: "It was then moved that the Compendium of the Trade Practice Committee omitting Article V, relating to price filing, be approved by the board of trustees as representing the best practices now prevailing in the industry and as such to be submitted to each member company. Motion duly seconded and unanimously carried."

Mr. Brick: That is my very point, Your Honor please. It was approved but it was not adopted.

Mr. Wooden: They voted to approve if but did not adopt it. All right.

Trial Examiner Norwood: Well, he may ask him
37417 what he knows about this matter, and whether he considered it in his previous answer.

Mr. Brick: Counsel may not make any distinction in those words, but I do.

Trial Examiner Norwood: Go ahead.

By Mr. Wooden:

Q. Now, you also testified, Mr. Alexander,—page 37220, and page 37221,—that there was no discussion of prices or marketing policies at any meeting of the board of trustees that you attended. Now, did you take into account the meeting to which I have directed your attention at which

the Compendium was approved? You say there was no discussion of the Compendium when it was adopted, or before it was adopted.

A. I have no memory of any discussion of it at all.

Q. You do not doubt that the minutes show that you were present, and that the Compendium was approved by a vote of the board of trustees?

A. I do not have any doubt that the minutes reflect that the Compendium was, whatever the minutes say.

Q. Do you want to stand on your testimony that at no meeting of the trustees that you attended was there any discussion of marketing policies?

A. I never remember any discussion of marketing policies.

Q. Now, is your testimony that you just do not remember, or do you want to say that there was no
37418 discussion of marketing policies at any meeting of the trustees?

A. Well, of course, if you want to give consideration of the Compendium,—distribution of the Compendium,—if you want to call that a discussion of the marketing policies, why, you may. I do not know whether it is marketing policies or not. I do not think I read it.

Q. Well, the minutes refer to them as the best practices prevailing in the industry. Weren't they marketing policies?

A. Well, I do not know. I do not think I ever read the Compendium. I do not remember reading it. I was not impressed with it at all.

Q. Your testimony that there was no discussion about marketing policies has to be considered in the light of what the minutes show about the Compendium, don't it?

A. Be considered as you wish to consider them. I do not remember them at all.

Q. Now, on page 37221 you were asked whether you were ever a member of the Code Authority, and you said no, sir.

A. That is right.

Q. Didn't you know that the board of trustees constituted the Code Authority?

A. No, sir.

Mr. Seeley: Now, Your Honor—

A. No, sir; I never did.

Trial Examiner Norwood: What is the matter with that?

37419 Mr. Seeley: I withdraw my remark.

A. That is news to me.

By Mr. Wooden:

Q. Did you ever read the Code of Fair Competition under the N. R. A.?

A. I think so.

Q. Did you know that the Code, itself, provided that the trustees of the Institute should be the Code Authority?

A. I did not know that.

Q. You did not?

A. No.

Q. Your testimony that you were never a member of the Code Authority has to be taken into account with that, with those facts?

A. The Code Authority, as I remember it, consisted of three or five gentlemen, I have forgotten which. I know I was never a member of the Code Authority that I have in mind.

Q. Who were the three or five gentlemen you refer to?

A. I—Mr. Rader was a member of the Code Authority, as I remember it; Mr. Neylan; I believe Mr. Sunderland was at one time, and I believe Mr. Reiter was at one time.

Q. Are you thinking, possibly, of the Trade Practice Committee that followed the Code Authority?

A. No.

Q. Well, it is a matter of record who they were.

37420 A. All right.

Q. Did the Missouri Portland Cement Company—I understand it was a member of the Institute from its formation?

A. Well, I do not believe from the formation. I think our company became a member in January, 1930, Mr. Wooden.

Q. Did your company subscribe to the Code of Ethics of the Institute in those early years?

A. Well, if they published a Code of Ethics, we probably got them.

Q. Don't you remember that it was subscribed to; that is, signed by a number of the members?

A. No, I do not remember that.

Q. Is it your testimony that the Institute never made any recommendation as to standard sales contracts?

A. I do not remember them ever making a recommendation as to standard sales contracts.

Q. Is it your testimony that you were never interested in a form of standard sales contracts?

37421 A. No, that is not my testimony.

Q. What is the answer to that, were you interested in a standard sales form contract?

A. You probably are referring to an inquiry which Mr. Reiter wrote to Mr. McConnell that I had made about standard sales contracts. I was considering revamping our company's sales contracts, and was looking around for the best type of contract that I could think of, and I had been told by our president that the Institute had given some considerations to making recommendations about certain important matters that should be incorporated in sales contracts, and I inquired of him if they proposed to make such recommendations, and I never heard any more from him after that outside of the letter from Mr. McConnell.

Q. Why were you interested in a standard form?

A. I was not particularly interested in a standard form, I was interested in an improved form. We did not feel our form was in very good form. It was more in the form of quotations which had a provision for acceptance, and was not what I considered a reliable form of contract.

Q. Do you mean to say that no standard form of sales contract was ever put out by the Institute for the consideration of its members?

A. I do not remember of any. I know our company never adopted it if they did.

37422 Q. Didn't you tell me yesterday afternoon that your terms and conditions of sale had been substantially the same as that of competitors?

A. I told you our terms and conditions of sale had been substantially the same since 1931, and that I presumed that our competitors would have to offer as favorable terms as ours, or lose business.

Q. Do you recall the portion of the Institute's Code of Ethics that provided for a standardization of sales contracts? I am referring you to Commission's Exhibit 138-P?

A. This is the first time I ever read it, Mr. Wooden.

Q. You did not know that the Institute's Code of Ethics made any such provision?

A. I do not think I have ever read the Institute's Code of Ethics.

Q. You did know, did you not, that the Code that

existed under the N. R. A. provided for and contained incorporated in it a provision for standardized form of sales contracts?

A. I remember that, and I remember distinctly that we did not adopt it.

Q. And also that the standardized form was provided in the Compednium?

A. I did not know that.

Q. And although you were present at the meeting where the Compendium was approved, you did not know that?

37423 A. You say I was there.

Q. The minutes show it.

A. The minutes show I was there.

Q. You did not doubt it, I understand?

A. No, I do not doubt it.

Q. Now, you testified at page 37222 that the Institute had never attempted to influence the specifications for standard cement. Were you aware that the Institute's Code of Ethics, back in 1930, provided for the use of the A. S. T. M. specifications?

A. No, I did not know that. I do not think I ever read their Code of Ethics.

Q. Did you know that the N. R. A. Code and the Compendium also provided for the use of those specifications?

A. I do not think I ever read the Compendium. I do think I did read the Code, but I do not remember that requirement.

Q. Now, you testified that your Missouri Portland standard cement 'exceeded standard 'specifications substantially, I believe; was that the word?

A. I do not know whether I used that word or not, but they exceeded the standard specifications.

Q. By how much?

A. Well, it would vary from time to time. It depends on which specifications you are referring to. Are you talking about the bricquet test?

37424 Q. You mean—I am not referring to— What I am talking about, you may make any test you like, any or all of them, but I am particularly concerned with the tensile strength test.

A. Well, I think our cement—take the average, and you understand that there is some variation in samples

from time to time, would probably exceed the specifications by 25 percent.

Q. In that respect your standard cement ranks higher than some of your competitors and lower than some?

A. Well, I think it ranks among the best of them. We test field samples that we pick up regularly, and ours ranks among the best of them.

Q. You say that yours ranks higher, substantially higher than some of your competitors?

A. Well, I would say that ours ranks higher than some of our competitors.

Q. Substantially?

A. I did not use the word "substantially."

Q. I am asking you.

A. "Substantially," to me, is an elastic word. I do not know how you are using it. Some of our competitors' cement does not test as good as ours, according to our tests.

Q. Well, you said this was what, 25 percent better than the specifications?

A. I said I thought that the general run of tests would reflect that ours was—would average about 25 percent more.

37425 Q. Now, have you found some competitors,—how much lower than the 25 percent have you found some competitors?

A. I do not remember paticularly, but I think we found some particularly that would not exceed the specifications by that wide margin.

Q. How much?

A. Maybe some of them do not exceed more than 20 percent.

Q. Are there some that do not exceed more than ten?

A. I do not remember of them.

Q. Some of them that do not exceed it more than twelve?

A. Well, I do not have those percentages in mind.

Q. Have you ever advertised publicly that your standard cement exceeds standard specifications by a substantial margin?

A. I do not believe we have ever advertised anything about specifications outside of our cement would meet specifications, and I do not think we ever advertised that. I do not remember it.

Q. Well, you testified you were never able to get a premium for your cement because of its better quality. How could you expect to get a premium if you did
37426 not let the purchasers know that it was a better quality?

A. The purchasers are only interested in using the cement that meets the requirements of the owner, or engineer in charge of construction, and usually they specify a cement that meets the American Society of Testing Materials' specifications.

Q. They are not interested in getting anything better than that if they can get it for the same price?

A. Yes, they would probably be willing to get it if they could get it for the same price; but the contractor generally is not interested in that phase of it.

Trial Examiner Norwood: In other words, the specifications are sufficiently low that all the competitive cements would meet the demand?

The Witness: Your Honor, I do not consider them low.

Trial Examiner Norwood: I said sufficiently low for all the regular brands.

The Witness: Well, I do not consider them low, but all the brands who would expect to sell the cement would have to meet the specifications. I consider them quite high.

Trial Examiner Norwood: I say, are they such that all the brands would meet it?

The Witness: In recent years, Your Honor, I do not remember of testing any cement that did not meet
37427 the specifications.

By Mr. Wooden:

Q. What do your salesmen use for the purpose of making price quotations in the field?

A. They use tabulations of delivered prices which our sales office furnish them.

Q. And how are those delivered price lists that the salesmen carry made up?

A. They are made up in our sales office by our clerk.

Q. And how are they made up?

A. Do you mean how do we arrive at the price, Mr. Wooden?

Q. Yes.

A. Well, we arrive at it in various ways. We arrive at it in some instances by establishing the price which

we hope that our competitors will follow, and in other instances we meet our competitors' prices.

Q. Are those delivered price lists which the salesmen carry ordinarily the equivalent of some base price plus freight to destination?

A. In some instances they are and in some they are not.

Q. Ordinarily?

A. I believe to most destinations that they would reflect a base at some cement shipping point,—so-called base.

Q. Plus freight from that point?

A. I believe most destinations would reflect such a condition.

37428 Q. Now, you have cases like St. Louis where that is not true; in other words, there is an arbitrary in effect there, isn't there?

A. I did not say there was an arbitrary. I said we established prices there which would not be a combination of so-called mill base and freight rate.

Q. They are higher?

A. Yes.

Q. What other place can you name where the delivered prices are not the equivalent of a base price plus freight?

A. A good many destinations in the Metropolitan District of Kansas City are not a combination of so-called mill base and freight.

Q. Is that because of an arbitrary switching charge in there?

A. No.

Q. What is the reason for it?

A. In that case we are selling cement for less than so-called mill base plus freight.

Q. What is the reason for it?

A. The reason is that the price tends to level off over the metropolitan area, and that at a good many destinations in the metropolitan area the freight rates are high as compared to the freight rates in other points of the metropolitan area.

Q. Now, are there any other places you can
37429 name where the delivered prices are not the equivalent of some base price plus freight?

A. I do not have any particular points in mind at this particular time. I remember it varied from time to time, in the various territories the delivered prices have had no relation to so-called mill bases.

Q. Now, with regard to this prepaid freight at Memphis, prior to July, 1937, did you prepay the freight to Memphis, or merely prepay it in the switching districts of Memphis?

A. As I remember it, we prepaid the freight to all destinations in Shelby County.

Q. Did you prepay it all the way from your mill?

A. Yes, sir.

Q. And that is the county that Memphis, is in, is it?

A. Yes, sir.

Q. When you said that — as I noted that, you did say, didn't you, on direct, that the Missouri Portland Cement Company had filed no prices since N. R. A.?

A. I did say that.

Q. What period did you have in mind when you said since N. R. A., the Code period?

A. Well, I had said on my direct since the Supreme Court decision.

Q. In other words, is it your testimony that the Missouri Portland Cement Company filed no prices
37430 during the time that the Trade Practice Committee was functioning?

A. That is my testimony.

Q. As a trustee for the Institute, did you hold meetings of the members in your district?

A. I think we had two or three meetings in District 8, one or two for the election of a trustee, and one, I believe, for the closing of the office. I do not remember others. I do not believe we had others.

Q. Were you in touch, from time to time, with the members in your district?

A. Well, I saw them occasionally, yes.

Q. I believe you said that some of your major competitors in the Sugar Creek district were not supporting the Portland Cement Association in 1931, along about that time?

A. At the time we resigned?

Q. Yes.

A. Yes.

Q. Who were those major competitors?

A. As I remember it, the Monarch Company was out, the Consolidated Company was out; the Oklahoma Portland Cement Company was out; the Arkansas Portland was out; the Nebraska Portland Cement Company was out.

Q. Was the Ash Grove out?

A. I do not remember whether they were or not. I believe—

Q. Was Dewey?

37431 A. I think Ash Grove was out before or after we were, for a while; I do not remember whether it was before or after.

Q. Was Dewey out?

A. I am not sure they were out. The Dewey plants were out, the Davenport plant.

Q. Now, referring to Commission's Exhibit 2885, about which you were asked on direct relating to a shipment by Alpha on behalf of your company in St. Louis County?

A. Yes, sir.

Q. Do you remember that?

A. Yes, sir.

Q. Was the mill net to Alpha more than it was to your company on that deal?

A. I do not think so. The movement would move on a switching rate from our plant, and I believe it was a cent and a half per hundredweight, plus the switching rate from the Alpha plant, and that would net about the same.

Q. What did you get out of such a voluntary turnover of that business to the Alpha Company?

A. It was not voluntary.

Q. Well, you did not have to do it, did you?

A. Well, the contractor insisted that he should ship some Alpha cement on the job, and he was a good customer of ours, and we were very reluctant to fail to comply with his demands; they were almost demands, that we should ship Alpha cement. He had signed a con-

37432 tract with us for the entire requirements before he had learned that the county officials were going to insist that he give part of the business to Alpha.

Q. That is after he had had his contract with you?

A. Yes. He informed us that they insisted he give them part of the business as they were large taxpayers in the county and were entitled to part of it.

Q. You were not in the county?

A. Yes, we were both in the county. We shipped about three-fourths, or four-fifths of the job.

Q. I see.

Now, regarding this shipment made by your company, six to eight thousand barrels for Marquette on Illinois highway work in 1932.

A. Illinois and Missouri, I believe; maybe it was all Illinois.

Q. I do not recall your mentioning Missouri.

A. Maybe it was all Illinois.

Q. Was that after the price advances were made in the summer of 1932?

A. Well, I do not remember the exact dates that we shipped that cement, Mr. Wooden, but we made shipments—all shipments we made for them were made in 1932 and 1936, or 1937.

Q. You got a higher net out of that shipment of that six or eight thousand barrels than Marquette could
37433 have gotten, didn't you?

A. I don't think so.

Q. You never looked into that?

A. Well—no—the destinations, as I remember them, were in southern Illinois, and I had in mind we might have shipped one in southern Missouri, and I believe their nets would have been as good as ours, and may have exceeded ours in one or two cases.

Q. Mr. Alexander, referring to this shipment that you made for the Dewey Company in 1935 to Cavein-Rock, Ill.

A. Yes, sir.

Q. I understand that was not on a railroad.

A. No.

Q. How was the delivered price calculated in that case?

A. It was calculated as being the market price at the town of Cavein-Rock. If you are asking me what so-called bases and freight rates applied, I do not remember.

Q. Was that a town that had a dealer?

37434 A. Yes. We quoted the dealer's price there.

Q. Well, how is a delivered price at a town that is not on a railroad calculated?

A. The nearest—

Trial Examiner Norwood: A little louder.

A. The nearest point.

By Mr. Wooden:

Q. The nearest railroad station?

A. Yes.

Q. Now, with regard to your requirement that the dealers send in the paid freight bills, there are a good many dealers who do not comply with that, are there not?

A. We found very little trouble, and sometimes it would be necessary to write and call it to their attention, but we

found very little trouble about it. It has been a requirement of our company for years and years.

Q. You mean there were few cases where they have not sent in the freight rate bills?

A. Yes. We did not have much trouble getting them to send them in.

Q. Would you sue a dealer for the freight if he did not send in the freight paid bill?

A. I do not believe we have sued them.

Q. Did you ever consider whether you would?

A. I do not think it ever became that much of a
37435 problem with us.

Q. You never considered it?

A. I do not believe we have ever considered suing a dealer.

Q. Do you mean to say, Mr. Alexander, that all dealers have always sent in their paid freight bills?

A. I did not say that there never was an exception, but there are very few, few exceptions.

Q. Do you mean to say that there have been no cases where dealers failed to send in the paid freight bills even after you wrote them, or took them up?

A. Well, I do not remember any specific cases. I am sure there have been a few freight bills that we have not been able to secure, but very few.

Q. Did you sue them for the freight in that case?

A. I told you we had not sued a dealer.

Q. Did you attempt to collect the freight from them in any way?

A. We attempted to have them send in the paid freight bill.

Q. Did you attempt to collect the freight from them?

A. Well, we did not attempt—

37436 A. We attempted to get them to send in the paid freight bill, and refrained from getting into any argument wherein we might lose a customer's account.

By Mr. Wooden:

Q. In other words, you did not insist on getting the paid freight bill?

A. Yes. We insist on it.

Q. Before clearing your customer's account?

A. Yes, sir.

Q. And when he did not send it in, you cleared the account, didn't you, without the freight bill?

A. When he did not send it in we charged it off.
Trial Examiner Norwood: Did you write to him for it?
The Witness: I beg your pardon?
Trial Examiner Norwood: Would you write to him for it?
The Witness: Oh, yes, yes.

By Mr. Wooden:

Q. In other words, you said you cleared it off?
A. We would charge it off if he did not send it in.
Q. Now, with regard to your statistics that you
37347 got from Mr. Mallory, you subscribed to his statistical service before he became statistician for the Institute, did you not?
A. We were subscribers to his service before he became associated with the Institute.
Q. You knew, did you not, that he was getting some information from your competitors, and that that you provided him?
A. We did not know where he was getting his information. We knew he got part of it from the Bureau of Mines, or so he said.
Q. Didn't you know that he got the figures on production and shipments direct from the company?
37438 Q. Companies.
A. I did not know where he got his information. We were not interested in any other outside of his forecasts on probable demands.
Q. You gave him the information, didn't you, direct?
A. I think we gave him some information. I do not remember just what information we gave him.
Q. And you got from him the summary showing, did you not, the production of shipments of your various competitors?
A. I do not remember of getting that. I do not remember whether he sent out such information or not.
Q. You do not remember getting that after he became statistician for the Institute?
A. Yes, I think that he sent out some similar information, similar to what you described.
Q. Giving the production of shipments for each individual company, including yours?
A. No, he did not give it for all companies. As I remember it, he gave it for part of the companies. I never did pay much attention to it, because it was more or less incomplete.

Q. In other words, you were not interested in any information that he might provide that showed how much each of your competitors was producing and shipping?

A. I was only interested in Mr. Mallory's forecasts on probable demand; paying no attention to these other statistics because they seemed to me to be more or less incomplete.

37439

Q. Do you mean to say, as a business man, Mr. Alexander, that you have no interest in knowing what your competitors are producing and shipping?

A. I have an interest in knowing what cement consumption is, and get the information from the Bureau of Mines, and I can compare ours with it.

Q. Will you answer my question, please?

Trial Examiner Norwood: Answer his question.

A. No, I am not interested in what my competitors are doing. I am interested only in what we are doing, and how consumption is running.

By Mr. Wooden:

Q. So far as your needs are concerned, then, you did not—you could get all you wanted from the Bureau of Mines instead of Mr. Mallory, couldn't you?

A. We could with the exception of the forecast on probable demand. They issue no such forecast.

Q. And even that forecast of his was based quite largely, was it not, on the Dodge Service, which was open to anybody that wanted to buy it?

A. Of course, Mr. Wooden, the Dodge Service only deals with building permits, and they do not attempt to try to convert building permits into probable barrels of cement.

37440

Q. As far as you are concerned, then, you had no interest, and would have no interest in knowing what your various competitors were producing and shipping?

A. I am interested in the total amount of cement consumption, Mr. Wooden.

Q. You never objected to Mr. Mallory identifying the production of shipments of your company in the reports that he made to your various competitors?

A. No. We have no particular secrets about our shipments, production.

Q. Then I take it you would have no objection to allowing a representative of the Commission to check your reports to the Bureau of Mines on production and shipments?

Mr. Seeley: The witness has answered that on voir dire, Your Honor.

Trial Examiner Norwood: Let him answer.

A. I will refer you to my counsel.

By Mr. Wooden:

Q. I am asking for your personal objection.

A. Subject to counsel's approval, I have no objection.

37441 Mr. Brick: Well, as far as the record is concerned on that, Your Honor please, and Mr. Wooden, we offered certain original records of this company for the purpose which we stated. One of the objections Mr. Wooden had to those original papers was that he required an opportunity to check them. There was the holding of Your Honor that since they were original papers there was no purpose to be served with respect to checking. The papers were received, and of course the question of checking became moot.

That is my answer to Mr. Wooden's further requirement.

Trial Examiner Norwood: I think Counsel is correct about that.

37442 Trial Examiner Norwood: Well, now, the counsel has made the request to the Respondents. They are at liberty to grant it or to deny it.

Mr. Wooden: I take it it is denied?

Trial Examiner Norwood: It appears to be denied. Go ahead.

Mr. Brick: Yes. There is no purpose now with respect to the demand. Counsel knows how he can get the papers if he wants to.

Trial Examiner Norwood: Well, there would be a purpose of checking it with the record, with those confidential records that this witness has made to the Bureau of Mines, and which the Bureau of Mines will not reveal except by his permission. There would be a purpose there.

Mr. Brick: Well, we submitted the original papers.

Trial Examiner Norwood: I have ruled that it was not a purpose that was necessary so far as the admissibility, reliability of the papers were concerned.

Mr. Brick: Well, I have not been persuaded to change my mind by anything Mr. MacIntyre said.

Mr. Seeley: To save time, when this matter comes

37443 up as I expect it is going to come up again, Your Honor, Mr. MacIntyre's statement referred to the checking of the accuracy of the records. How can you check a record which is the original record, which is the record itself. It shows what it shows.

Trial Examiner Norwood: Well, we have gone into that. Go ahead.

Mr. Wooden: My only point was that the witness had no objection to furnishing those figures to Mr. Mallory, and he has no personal objection to our checking the Bureau of Mines, but counsel seems to have an objection.

37444 Mr. Brick: Well, if we see some purpose to be served, we will be glad to bring them in. So far, we have not.

By Mr. Wooden:

Q. Mr. Alexander, you gave some figures on the capacity of your mills, and stated, I believe, that they were estimates of what you could produce under most favorable conditions; is that right?

A. That is correct.

Q. How were your capacity figures calculated?

A. We know from experience about what each kiln will produce in the way of clinker, and we know from experience about what each mill will run, and we have operated the various units over a period of time, and taking all those things into account, taking into account we had a few breakdowns, we have estimated our capacity as being approximately what it was, what I said on direct.

Q. Were the figures you gave based on your experience in producing for the three highest consecutive months of your experience?

A. Certainly was not.

Q. Was it based upon any sample or period taken out of your experience?

A. No, sir.

37445 Q. Just a mere general—

A. That is right.

Q. —opinion?

A. That is right.

Q. Now, with regard to the records of sale as kept in your auditing or accounting division, does your company make reports to its stockholders each year of the amount of its sales?

A. In dollars and cents?

Q. Yes.
A. Yes.
Q. And number of barrels?
A. No, sir.
Q. The total dollars and cents figures that have been reported to the stockholders, that is the total of your mill nets, wasn't it?
A. No, sir.
Q. What was it?
A. The total of our delivered prices, including discounts, sacks, freight, and net.
Q. And net?
A. Yes, sir; all totaled.
Q. You included the whole and the net?
A. We included everything that I told you we included, and that is our gross sales.
Q. Including freight; was freight separated?
37446 A. Including discounts, freight, sacks.
Q. Was freight separately shown?
A. No, sir.
Q. You had a statement to stockholders on net sales?
A. After—we also showed it to the stockholders in our report, that after deductions of discounts and allowances, deductions of freight and sacks, and any other deductions that we had, net sales of so much.
Q. And did you show the freight separately?
A. No, sir.
Q. You did show the total of delivered prices separately?
A. We showed our gross sales, which include all items I told you.
Q. In the net sales did you include the freight that had been prepaid?
A. No, sir.
Q. You took out all freight?
A. We took out all discounts, and allowances of freight, and of sacks, when we arrived at a figure.
Q. And you made no distinction between the prepaid freight and that which was not?
A. No, sir.
Q. How long have you been doing that?
A. Well, prior to 1934 the company did not make a report of sales to its stockholders. It only sent out
37447 to its stockholders annually a balance sheet. Beginning with the year 1934 we published a profit-and-

loss statement on which we tabulated the information I have just described.

Q. Are those profit-and-loss statements—strike that. Were your stockholders informed of the amount of money that was used in the prepayment of freight?

A. I have told you that we made no separate report to the stockholders with reference to freight.

Q. Have you figured what your average mill net was by dividing the barrels sold into the total mill nets?

A. Yes, sir.

Q. Have you ever calculated what your average delivered price was by dividing your barrels into your total or delivered prices?

A. Yes, sir; we have done that on special occasions.

Q. Have you put that in the information to your stockholders?

A. No, sir.

Q. What special occasions do you refer to?

A. I think that we did that in connection with the—some office tabulations that we made up a time or two to make a study of averages. I do not remember the details of it, but we have done it,—

Q. When?

A. —I remember particularly doing it.

Q. When was that?

37448 A. Well, the time I have in mind was in 1930.

Q. You did not do it as a regular thing?

A. No.

Q. Mr. Alexander, before appearing here as a witness, have you made it a practice to read the record of the testimony in this case?

A. I read the testimony of most of the Government's witnesses; I think practically all of them. I have read very little of Respondents' testimony.

Q. How much of it have you read?

A. Well, I read part of the testimony of three or four witnesses.

Q. Which three or four do you have in mind?

37449 A. I think I read the first two or three days' testimony of Mr. Coogan, and I have read, I think, one day's testimony of Mr. Bowen, and I think I read—I do not remember others I have read. I have not read any testimony in some time; I have been too busy.

By Mr. Wooden:

Q. Did the Missouri Portland Cement Company obtain from the Cement Institute information regarding land-grant rates?

A. No.

Q. Even at the time that the Institute was putting out that?

A. No.

Q. Why is it you didn't receive it?

A. We never asked for it.

Q. You did not receive it unless you asked for it?

A. I do not think so.

Q. Is that your understanding?

A. I do not think so. I do not believe they were broadcasting—I do not remember if they were broadcasting that.

Q. Now, in your stipulated testimony, you testified that your company had never had any agreement with any of its competitors with respect to its policy towards diversions of shipments in transit.

A. Yes, sir.

Q. I am asking whether in making that, in giving that testimony, you have taken into account the provision
37450 of the Institute's Code of Ethics that appears in Commission's Exhibit 138-S, paragraph numbered 14.

A. Well, this is the first time I ever read this, Mr. Wooden. I did not know that the Code of Ethics contained such a paragraph.

Q. You did not even know, did you, that—or did you know that the N. R. A. Code also contained a similar paragraph?

A. Well, I do not remember it particularly, but I do not doubt that it did.

Q. Did you know that the Compendium also contained a similar paragraph?

A. No, I did not know that.

37462 Trial Examiner Norwood: Now, I want to ask this witness (Witness Alexander) if he can give us any further basis for that general statement.

Do you remember any further particular occasions where more favorable terms were offered by your competitors to the issuance of the complaint?

The Witness: Yes, Your Honor, I have other occasions in mind.

Trial Examiner Norwood: What are they?

The Witness: I have in mind the Carey Reed Contracting Company, who advised me they were in position to secure more favorable terms than we were offering them on work they were building in Memphis, Tenn., and in Mississippi.

The Witness: I have in mind the Davis Construction Company of Missouri, who advised me that they
37463 were in position to secure more favorable terms than we were offering.

Trial Examiner Norwood: Well, did you meet those terms?

The Witness: I did on some occasions.

Trial Examiner Norwood: Did you on those two occasions?

The Witness: Yes.

37467 W. B. ELCOCK, called as a witness for the Respondents, being first duly sworn, testified as follows:

Direct Examination by Mr. Werle.

I am vice president and general manager of the Southern States Portland Cement Company, and have held
37468 that position from July 1, 1935. Prior to that date I was not associated with Southern States. Prior to joining with Southern States, I was employed on April 1, 1914, by the Portland Cement Association, [and] was with them for a period of approximately 3 years, until I left, and enlisted in the Army. After two years' service in the Army I returned to the Portland Cement Association and stayed with that organization until December 1, 1925. I was away from the cement business then for a period of about 6 months, and then went with the Atlas Portland Cement Company in New York City. I stayed with that company until it was bought by,—or taken over or merged, or whatever you want to call it, with the Universal Portland Cement Company. I never did understand the details of the thing. And I remained with them in that position of district sales manager until July 1, 1935. That is at the time I left there to go with Southern States.

During my first employment by the Portland Cement Association, I started out as a field inspector on concrete road construction. I was on that for a period of about one

year and a half, and took over the promotion duties
37469 in four Western States, Colorado, Utah, Wyoming and Idaho. I stayed there until April, 1916, at which time I was transferred to Atlanta, Georgia, as district manager for the Southeast.

Q. Now, then, I think you said you were district manager of the Portland Cement Association from about 1919 to 1922.

37470 A. 1925.

Q. Can you tell me briefly what were your duties in that position?

A. Promotion of the uses of cement and concrete. I had a force of about 45 or 50 men under me in the Southeastern States, scattered through six different offices, and we did everything that was within our power to promote not only the use but the proper use of Portland cement.

Q. Did you, during that period, or in that capacity, have anything to do with the marketing of cement or sales or prices of cement?

A. Absolutely nothing.

Q. Does that cover your entire connection with the Portland Cement Association?

A. It does, Mr. Werle.

Q. And during any part of that period did the activity of that Association—certainly that which came under your direction and supervision—ever have anything to do with prices and marketing policies of the member companies?

A. The first instruction which I had when I went with the Portland Cement Association was that the mention of such a word as "price" meant immediate discharge. It is as clean an organization as there is in the country.

37471 Q. Well, Mr. Elcock, what has the Portland Cement Association—what activities of the Portland Cement Company are there which are used and taken
37472 advantage of by the Southern States Portland Cement Company?

A. Oh, there are a great many things there. To me, first of all, the most important thing is the technical service of the laboratory of the Portland Cement Association, which, in my judgment, is a very good organization, is trying to do very effective work, and I think is accomplishing a great deal.

I think it has had a great deal to do with the bettering

of the quality of Portland cement as the years have gone along, but in addition to that, of course, there are not only the activities of the Chicago office but the activities of the branch offices which carry on the identical promotional work through field men, which I used to have charge of years ago.

There is a very extensive service in getting out information for users of Portland cement.

There is the advertising which they do as an organization.

Q. Well, just to shorten it a bit, at any time have the activities of that Association concerned marketing policies and price of cement?

A. Never.

37473 Q. Is the Southern States Portland Cement Company affiliated in any way with any other cement manufacturing company?

A. No.

Q. Let me call your attention to Commission's Exhibit 3160-A to C, which purports to be an answer of Southern States to a questionnaire of the Federal Trade Commission. Under paragraph 2 are listed the officers of the company.

Will you tell me whether those are still the officers of the Southern States Portland Cement Company?

A. No.

Q. Will you tell me which—

A. Ben T. White, listed as president on here, is still president. James Vandeventer, listed as vice-president on here, is still vice-president. B. Cowden, secretary and treasurer, is dead.

The directors listed here, Ben T. White is still a director. James Vandeventer is still a director. Charles M. Seymour is still director. E. B. Simon is dead. F. F. Vandeventer is off the board.

Q. Are any of the officers of your company offi-
37474 cers of any other cement company, Mr. Elcock?

A. No.

Q. Any of the directors?

A. No.

Q. To what extent does Mr. Ben T. White participate in the operations of the company?

A. He attends directors' meetings and presides at the board meetings.

Q. Does he have anything to do with the marketing of cement?

A. Nothing whatsoever.

Q. And what about Mr. Vandeventer?

A. He has none, either.

Q. When did Mr. Cowden die, by the way?

A. Mr. Cowden died in August, 1939.

Q. How long has that mill that you operate been in operation, Mr. Elcock?

A. It started turning out cement in 1905, and has been in operation continuously since.

Q. Now, Commission's Exhibit 562-10-D and Commission's Exhibit 3160-A, both show capacities of your company, Mr. Elcock in 1932 and in 1934. For example, on Commission's Exhibit 562-10-D the capacity of your company as of 1934 is shown as 652,000 barrels. Do you know whether or not that is correct?

A. It is not.

37475 Q. And Commission's Exhibit 3160-C; the annual capacity as of January 1, 1932, 600,000 barrels. Do you know whether or not that is correct?

A. I would say that that is also overestimated. However, I would have to qualify my statement there is this way: At that time the mill used its own power, the mill manufactured its own power, and in my judgment on those days, dates, it could not have produced more than about, oh, I would say, 550,000 barrels.

Mr. MacIntyre: Just a moment. I want to move to strike the question and the answer, and I object to further questions along the line based on these two exhibits. They are writings by, or at least part of them are by officials of this company concerning its capacity at a year when this witness was not connected with the company and he is now giving opinions as to whether or not they were correct in their statements as to what its capacity was years before he went with the company.

Trial Examiner Norwood: He is stating it on his own knowledge.

Mr. MacIntyre: He could not have had knowledge of the operations of that company. He was with another company up in New York, not down in Georgia in that year.

Mr. Werle: Let us see whether he has or not.

Trial Examiner Norwood: Well, I think I shall

37476 deny the motion.

Go ahead.

By Mr. Werle:

Q. By the way, Mr. Elcock, when you came with the company in July of 1935, were you then able to observe the operation of the company sufficient to know what its capacity was at that time?

A. Yes, sir.

Trial Examiner Norwood: These exhibits that you put in there, did you put them in to show the capacity of this company?

Mr. Werle: We did not put these in. These are Government exhibits, Judge.

Trial Examiner Norwood: Oh, I see.

Mr. MacIntyre: If Your Honor please, we put them in to show the capacity of the company as admitted by its officials, 1930, 1931, 1932, or thereabouts, and that was three years before this witness went with that company.

Trial Examiner Norwood: They have a right to explain those exhibits.

Go ahead.

By Mr. Werle:

Q. Do you know in your experience with the company, Mr. Elcock—do you know from your experience whether or not the capacity of the company was changed during
37477 the period from 1932 through 1935 when you arrived?

A. There is no record of it having been changed. The capacity of Southern States has changed since I have been with the company. I will have to go back to what I was saying a moment ago. This little company has 8 small kilns. When the company was using its own power plant, the power plant did not produce sufficient power to pull equipment which could be used in the manufacture of cement for more than 6 kilns. I scrapped the power plant shortly after I got there, installed new electrical equipment, and bought our power from the Georgia Power Company, which has, as far as I know, an inexhaustible supply. That had the effect of raising the prior capacity by one-third, and also advances in the art have permitted us to get a little bit more material through the kilns today than we could then. We have always had grinding capacity far in excess of the kiln capacity. I estimate our capacity today as approximately 780,000 barrels a year. I estimate that on the basis of actual runs and actual production
37478 through 7 of the 8 kilns. It is not very difficult to

estimates from that, knowing the figures, knowing the production we get through there, that we make 65,000 barrels of cement a month, possibly a little bit more than that, and taking the 12 months, gives us 780,000.

Q. Can you determine the capacity of your plant on the basis of any formula provided by Mr. Mallory of The Cement Institute?

A. We do not.

Q. Since you have been with the company has that been so?

A. In no way.

Q. Has Southern States Portland Cement Company ever operated at full capacity?

A. Never; that is, in my experience.

Q. Well, do you know from your experience with the company, and from the records of the company, whether or not it ever did, prior to your coming there?

A. They did operate at full capacity of six kilns, that is all; never any more than that.

Q. Now, then, apart from this change in your capacity through the elimination of your own power plant, have there been any factors which have affected the capacity of your plant since you have been there?

A. Yes.

Q. Will you tell us what they are?

37479 A. Complete mechanization of the quarry, which, when I went there, was a hand-operated proposition, and is today operated by machinery.

Mr. MacIntyre: Just a moment.

I want to object to further following of this particular line because of immaterality as to detail. It does not meet any issue.

Trial Examiner Norwood: What does it go to?

Mr. Werle: Why, it goes to the charge that runs through the Government's evidence that there are certain mills which are being carried along by others, antiquated, dilapidated and run-down mills which are carried along by a pricing system. That is in the complaint.

Trial Examiner Norwood: Now, I have ruled several times that that is out of this case. I do not consider it an issue.

The objection is sustained.

37482 By Mr. Werle:

Q. Do you manufacture more than one kind of cement, Mr. Elcock?

A. No.

Q. With respect to your standard Portland cement, does it conform to the minimum specifications, or is it below them, or is it above them?

A. Above them.

Q. Do you manufacture it purposely above the minimum specifications?

A. We manufacture that way to meet competition.

Q. Has the increase in the quality of your cement above the minimum specifications occurred gradually, or
37483 has it been sudden? Will you tell us about that?

Mr. MacIntyre: Objected to as immaterial detail.

37484 Mr. Werle: Well, in that connection, I offer to prove through this witness that this condition has been occurring over a period of years gradually, as he has found by tests of competitive cements and by reports from customers of his that competitive cements are increasing in their quality with respect to plasticity and higher initial strengths, and that this company, therefore, has found it necessary, in order to meet that competitive condition, to increase its own standards and its own quality accordingly; that, as one example of that, whereas ten years ago 97 percent of the final grinding of cement went through a 200-mesh sieve—97 percent at the present time, I believe, goes through a 200-mesh sieve—

Is that correct, Mr. Elcock?

—that 10 years ago only 85 percent went through
37485 a 200-mesh sieve.

I think that is sufficient with respect to that.

37487 Trial Examiner Norwood: Now, you deny that situation?

Mr. MacIntyre: Mr. Wooden has admitted on the record that there were technological improvements in this industry by quite a number of the members of it, some of which are Respondents.

Trial Examiner Norwood: Well, I shall ask the witness if that statement there which the Counsel has made as an offer of proof is true.

The Witness: Absolutely true.

By Mr. Werle:

Q. Mr. Elcock, let me call your attention to Com-
37488 mission's Exhibit 562-10-E, which purports to show for your district the trend of costs in producing

cement per barrel, and it shows that for the first six months of 1933 the costs were going down perceptibly. Will you tell me as to that whether or not you know what the trend with respect to costs has been and was after the first six months of 1933?

Mr. MacIntyre: I object. The witness has not been shown to be competent to testify as to that as to his company that he is now connected with, or with the company with which he was connected in 1933. He was not in the proper department. He was a district sales manager for the Universal-Atlas in 1933 and has only been with this company since 1935.

Mr. Werle: As to that, I have asked him to tell us what he knows about the trend of costs since the first six months of 1933. Now, if he knows what it was in the last six months of 1933, he can tell us; if he does not, he can tell us what he does know with respect to the trend of costs after that.

Trial Examiner Norwood: Lay the grounds for that. What do you know about those figures at all? What did he have to do with them?

The Witness: Well, I have an intimate knowledge since July 1, 1935, and, of course, when I went in there, Judge,

37489 I did a very considerable amount of study as to what had been going on, so I think I am fully competent to answer the question.

Trial Examiner Norwood: You mean you can testify now to something that developed in 1933?

The Witness: Certainly. The records were there when I went in there, and it was easy to find out what it cost to make a barrel.

Trial Examiner Norwood: You will have to bring the records.

37490 By Mr. Werle:

Q. Well, let me ask you this question, then, Mr. Elcock: Is cement rock the only thing you obtained from your quarry?

A. No.

Q. What other material do you obtain?

37491 Trial Examiner Norwood: Now, I do not see why you continue and persist in wasting time by bringing out those details after I have given you the benefit of your—

Mr. Werle: This is different, if Your Honor please.

Trial Examiner Norwood: Well, what do you want to bring out?

Mr. Werle: This particular question is not the question I asked him a moment ago. I have gone to something different now.

Trial Examiner Norwood: I cannot see the object of it, unless you can show me.

Mr. Werle: I will show you right now, I think, that this company has a condition in its quarry whereby it obtains a stone which they use to make crushed stone, and the marketing and sale of the crushed stone does have a bearing with respect to this company on its sale of cement, and I think it bears directly on this question of competition.

Trial Examiner Norwood: How?

Mr. Werle: Well, I think the witness will testify that, having this crushed stone available at the same location that the cement is available, that he does have an advantage over competitors in that area with respect to the sale of cement, and that he takes advantage of that advantage.

37492 Trial Examiner Norwood: How do you mean? By bidding lower than the other competitors?

Mr. Werle: Well, I do not want to commit the witness as to what he does.

Trial Examiner Norwood: How does he take advantage? Takes a price ? vantage?

Mr. Werle: I prefer to let him tell us that.

Trial Examiner Norwood: Well, you will have to state what you are going to show.

Mr. Werle: Well, for one thing, I think it is true that this company is able to furnish to contractors, people who are working on highways, projects, matters of that kind, easily accessible crushed stone, which does influence the purchase of cement from this company as distinguished from some other company.

Trial Examiner Norwood: What has that to do with price competition?

Mr. Werle: Why, I think it very definitely has.

Trial Examiner Norwood: I say how?

Mr. Werle: Well, if Your Honor please, it is the same situation of a man giving you one book for a dollar and another man giving you a book plus a gold book case to put it in for a dollar. You are getting something different for

the same amount of money. If that is not price competition I do not know what is.

37493 Trial Examiner Norwood: I shall exclude that entire line and give the counsel the benefit of an exception.

We have let in a great deal of testimony here to give the picture. We have not time for it any more. I think the record is very clear.

Mr. Brick: I wonder if Your Honor has any suggestion with respect to what we might be able to do in connection with the allegation charging that the result of the alleged statements made in the complaint is the presence of inefficient mills, and I think, as the record now is, that it would be proper for any Respondent to come in and to establish that he has an efficient mill. Now, with that charge in the complaint, it seems necessary for us to do that. But there are many ways of doing it. It could be done through experts, bringing out the facts through industry witnesses, which we have wanted to do. We did not think it would take very long, in the absence of interruptions, and would probably serve the purpose in demonstrating that each company takes advantage of whatever factors are present to help it in its business.

Now, do you think we ought to ignore it? I know that you have given us an exception to the line, but I do not know just how far we should go as to each Respondent?

Trial Examiner Norwood: Well, in ruling it out I have considered the matter very carefully.

37494 Mr. Brick: Yes, I know that.

Trial Examiner Norwood: And feel sure that such a ruling will not prejudice you in any way.

Now, there are several reasons for that, and we have discussed them from time to time, and there is no need rehashing them here. I think the subject of this being a progressive industry, and better machinery, and all of that, has been sufficiently covered.

Mr. Brick: Well, if we had been permitted to meet that situation, why, we would not go any further now.

Trial Examiner Norwood: Counsel, you have your exception to that. We have no time to continue to go into those particulars.

Mr. Werle: The difficulty, then, Your Honor, is, you say we haven't time to go into the particulars, and Mr. MacIntyre objects on the ground that it is detail.

We are faced with broad charges in that respect, and we could put somebody on the stand to make a counter broad charge, but we are trying to give the facts from which the resulting inference will be clear one way or the other.

Trial Examiner Norwood: Well, what I think about it is, you are faced with these pleader's conclusions as to effects.

Mr. Werle: Well, Your Honor has called them "effects," but I have looked them over quite recently again,
37495 and it seems to me they are allegations of pure straight facts. That is what they appear to me. They are labeled "effects," but the label does not mean anything when you look at what they say. There are factual allegations in there. This is a factual allegation: "The buying public pays the same prices precisely as though there were no natural advantages in producing cement. The result of this is a loss to the buying public." Well, we can't even show what the result is.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: If Your Honor please, as to that, Mr. Wooden has admitted it, and I do again now, that everything in that paragraph 8, as well as paragraph 9, of the complaint may be taken as statements of effects of the operation of any combination that is proven by evidence going to the other paragraphs in the complaint.

Mr. Werle: Well, the difficulty with that is that, having those effects charged, and having some inferences in the record from which someone might conclude that those effects were present, you then may be able to use the effects to establish the existence of the combination. That is what he objected to.

Trial Examiner Norwood: I do not think—

Mr. MacIntyre: Mr. Wooden has admitted he will not use any of the statements as to the effects there or
37496 any evidence relating to the statements of effects as appear within paragraphs 8 and 9 of that complaint to prove the existence of a combination.

Trial Examiner Norwood: In other words, you will admit paragraphs 8 and 9 are pleader's conclusions; is that right?

Mr. MacIntyre: Under which no evidence has been received in the record or will be considered in arguing this case before the Commission to prove the existence of a combination as charged in the complaint.

Trial Examiner Norwood: I think that is clear enough.

37498 By Mr. Werle:

Q. Mr. Elcock, how many other manufacturers of cement does your company compete with in the area where you sell?

A. About twelve.

Q. Can you tell us the names of the companies?

A. Starting with the big ones, Universal-Atlas, Lehigh, Alpha, Lone Star, Penn-Dixie, Signal Mountain, Cumberland, Hermitage, Volunteer, Florida to a very limited extent; then on the edges of the territory, Lehigh Valley mills can come down to North Carolina. They are not an important factor, except on the fringe of the territory.

Q. Does that cover them all?

A. National Cement Company.

The witness identified Resp. Ex. 2816 as a map indicating the territory in which Southern States normally solicits business in an area enclosed within the heavy black line; the area enclosed within the green line
37499 indicates the approximate area in which the company has the lowest freight rates. He can vouch for the substantial accuracy of those areas.

(RESP. EX. 2816, was offered and received in evidence.)

By Mr. Werle:

Q. Mr. Elcock, can you just describe on this map in what area your company markets the largest percentage of its output?

A. We market the largest percentage of our output in northern Georgia, western South Carolina, and western North Carolina.

Q. You say that that is within the area that you have some freight advantage?

A. We try our best to keep within that place where we have a freight advantage. We are supposed to go outside some, but we try to stay in.

Q. I notice that your black line runs pretty close to the Florida border. What is the reason that you do not
37500 go into Florida?

A. The price is too low down there, for one thing. Secondly, the prices were very low there and we were forced out of there. And we find that it is almost impossible to get back into any territory once you get out.

Q. Would you tell me why that is?

A. Well, the customers build up new contacts while your men are missing, and they resent the idea that you did not stand by them and go through regardless of what the prices were.

Q. What other considerations are there, generally, that determine what area you will solicit business in?

A. The area that in my mind is the high dollar.

Q. I notice from this map, Mr. Elcock, that the area in which you solicit this business falls short of Birmingham, Ala., goes as far as Chattanooga, and falls short of Knoxville, three of which are fairly large markets of cement, are they not?

A. Yes, sir.

Q. Will you explain why you do not solicit business in those markets?

A. We find it impossible to sell there.

Q. Have you tried it?

A. Yes, sir.

Q. During the period that you have been with the company has your market area shrunk to any degree?

A. Not particularly since I have been with the company, no.

37501 Q. Now, coming to the practice and policy of your company with respect to prices, does the Southern States Company sell its cement exclusively at delivered prices?

A. No.

Q. Has there been any period during which you have been with the company that you sold all of your cement at delivered prices?

A. I will say no. I do not believe there has been.

Q. Does the Southern States Company have any understanding or any cooperative arrangement or agreement with any other Respondent whereby you sell your cement any particular way or by any particular method?

A. None.

Q. I do not know whether you told us or not, Mr. Elcock, whether the greater part of your sales are made at delivered prices. Is that correct?

A. The greater part are made at delivered prices.

Q. Now, will you tell us why?

A. That is how the customer wants it.

Q. Are there any reasons beyond that?

A. None. That is where the market is. That is
37502 where he wants his price.

Q. What has been your experience regardless of the manner in which prices are requested? Do buyers buy at a mill price, or do they buy at a delivered price?

A. They buy at a delivered price.

Q. And in your experience has that been confined to any particular class of customers, or does it apply to all?

A. It applies to all of them.

Q. Does your company establish prices or do you follow competition? What do you do in that respect?

A. Normally a price follower.

Q. And what do you mean by that?

A. Well, I once made a change in prices myself.

Q. I see.

A. An exception to the rule.

Q. But normally being a price follower, what do you mean by that?

A. I normally find prices out in the field, and I meet that price.

Q. Does your company have any understanding or any arrangement or any agreement with any other Respondent that your company will be a price follower?

A. No, sir.

Q. Has your own best judgment as to whether you would or would not be a price follower been restricted or
37503 limited in any way?

37504 A. No, sir.

Q. How do you determine what the competition is that you want to meet?

A. Everybody in any given town acquainted with the industry at all knows what the competition is there. Everybody knows the price of cement at any point.

Q. And how is it communicated to your company?

A. Salesmen pick it up in the field and send it in to us in case of change.

Q. If you should bill a customer at a price higher than the lowest price prevailing at his destination, what would happen? What has happened?

A. We did it the other day. They shot back at us a quotation from the Lone Star Company, and they said, "This is the price." We did not know it. We were forced to reduce our price to meet that level.

Q. And has that happened on other occasions?

A. Yes, sir.

The witness identified Resp. Exs. 2817, 2818 and
37505 2819 as correspondence between Southern States and the Tucker Kirby Company of Charlotte, N. C., and is the instance about which he just testified.

Q. And will you tell me whether or not the manner in which that information was communicated to you in Respondents' Exhibit 2818, and the manner in which you handled it as shown by Respondents' Exhibits 2817 and 2819 is typical of the way in which that has occurred in the past?

A. Absolutely typical.

Q. Do you remember whether or not in that connection that customer did send you the quotation which he had received?

A. Yes, he did.

Q. And was lower than yours?

A. Five cents lower, as I remember the transaction.

37506 Trial Examiner Norwood: Did that represent a regular broadcast price or a special price made by your competitors?

The Witness: That was a regular broadcast price, which we did not happen to pick up, Judge.

Trial Examiner Norwood: How long had it been in effect?

The Witness: They told us it had been in effect for 30 days before we picked it up.

(RESP. EXS. 2817, 2818, and 2819 were offered and received in evidence.)

37507 By Mr. Werle:

Q. When you, in your company, Mr. Elcock, have occasion to quote a price at a given destination, what is the first thing you do in order to make up your mind what price you will quote?

A. We do not have to do anything about it. We have a list of prices right before us. We know what the price is at a given point. We pick up the information in the field.

Q. And do you or do you not attempt to keep currently advised of changes in prices at destination?

A. Couldn't do business unless we did.

37512 Q. Now, how have you found that out? What was giving you reason to believe that, Mr. Elcock, on the

occasions you have in mind? Can you give us any instances of it?

A. I can give you an illustration.

Q. If you will, please.

Trial Examiner Norwood: Give us factual experience about it.

A. All right, sir.

When I took this company over, as I said a moment ago, Judge, and it became necessary to get some business, to get it quick, I knew that a contractor in Savannah, Ga., the Esty Paving Company, had a contract that required 26,000 barrels of cement.

I went down to see Mr. Esty, and I cut the price 5 cents a barrel, and he would not give me any business. I lowered it another 5 cents, he would not give me any busi-
37513 ness. I lowered it another 5 cents and he would not give me any business, and I lowered it another 5 cents and he gave me twelve out of the twenty-eight. That is all he gave me.

Trial Examiner Norwood: He weakened, then, did he?

The Witness: He weakened.

By Mr. Werle:

Q. Now, when you received word from your salesmen, or customers concerning an advance in price at a particular destination, will you tell us what you do before you determine whether or not your company will meet
37514 that particular advance at that point?

A. We go rather slow. We try to find out if it is more or less broadcast, or in some particular territory, and we try to check out what it means. We try and check out and see if there is any competitor of any kind in there, and we ordinarily can find that there is, and when others seem to be going along, we hear about it, we usually go along. We are glad to get more money for cement.

Q. Now, in the case of a decline in price that you find at a particular destination, what do you do?

A. We have to meet that right then and there or else you won't get any business.

Q. Now, in meeting changes in prices at destination, what has been your company's practice as to the date on which you make your new prices effective?

A. Declines are effective immediately but actually are retroactive, a few days back.

Advances follow the leaders, whoever it may be. We

try to follow what is going along. We are not trying to stick our neck out. We are too small to feel—we just follow along with them.

Q. Now, following the advance in price, are you able to state from your experience how soon you receive orders under the new prices?

A. It takes a long, long time. Our latest ex-
37515 perience is it has taken us almost a year.

Q. Will you explain why that is?

A. Everybody, most everybody, every company in the business loads up with low price business at the old going prices. There are phoney contracts, there are padded contracts, and the company that does not go in and do that just does not get a barrel of business of any kind.

Q. Do you give your customers a certain amount of time in which to purchase at the old price?

A. Yes, sir; we do.

Q. How much time do you give them?

A. Fifteen days.

Q. And then with respect to your specific job contracts, which are outstanding, do they have any clause with respect to declines in price?

A. Yes, sir.

Q. Will you tell us just what that is, briefly?

A. The clause is in there that in the event of a decline in price the price on the contract will go down to that point and will not recover during the life of that contract.

Q. From your experience, will you tell us what is the effect on your company, if you quote a price lower to one dealer than you do to other dealers at the same point?

A. Other dealers find out about it, they toss you out the window right then and there, they are through.

37517 Trial Examiner Norwood: If the Commission put in special evidence showing that this Respondent had continued a particular practice at a particular time, why, you could negative it by evidence here; otherwise, it is introducing a particular negative to meet a particular, different or particular affirmative which is—

Mr. Werle: I would not say this is not either negative or affirmative, Your Honor. I am trying to develop through this witness what he does with respect to prices, that is what this case is all about, and this is something he has done.

Trial Examiner Norwood: This case is about what he did prior to July 2, 1937.

Mr. Werle: Well, I understood that it was what he has done prior and since then.

Trial Examiner Norwood: No. I think not. I have explained that.

The objection is sustained.

Mr. Werle: Then I again move to strike the Government's exhibits which were subpoenaed—that is, certain invoices of the various Respondent companies, and particularly Commission's Exhibit 2705-1 to 32, which represents invoices of this company during the month of April,
37518 1938, and also the Government's evidence with respect to Commission's Exhibits 1339, 40 and 41; I think they are Procurement Division invitations subsequent to the date of the complaint.

Trial Examiner Norwood: The motion is denied.

Mr. Werle: And also all other bids put in by the Government which relate to bids of these Respondents subsequent to the date of the complaint.

Trial Examiner Norwood: The motion is denied. Any of that evidence that appears to be irrelevant and immaterial will not be considered in making any findings here.

By Mr. Werle:

Q. What has been your experience with respect to advances and prices, Mr. Elcock? Have you found that every time that someone has attempted to advance prices that such advances have always been followed, or what have you found as to that?

A. They are not always followed.

Q. Do you recall from your experience any instances of that?

A. I recall an instance several years ago when the Penn-Dixie Cement Company, I believe it was, attempted to raise prices, and it was followed by two or three or four companies, and the rest did not go along, which resulted in the prices going back to where they were before.

37522 Q. Mr. Elcock, this incident you mentioned of the Penn-Dixie Company's attempt to increase prices, was that or was not it in the same area that your company made this increase which you have mentioned?

A. It was.

Q. Now, at the time the Penn-Dixie Company attempted that advance in prices, did your company follow it?

A. We did.

Q. And you say subsequently the prices receded?

A. Had to withdraw it.

Q. At the time that you followed it did you follow it as the result of some understanding or arrangement with the Penn-Dixie Company?

A. I did not.

Q. Did you know prior to the time that they attempted this advance that they were going to do it?

A. I did not.

37523 Q. At the time that your company subsequently attempted to advance prices at that same point, did you announce that to your competitors before you made the move?

A. I did not.

Q. Did you make that move as the result of any understanding or arrangement or agreement with any of your competitors?

A. I did not.

Q. Does your company receive The Cement Institute freight rate books?

A. We do.

Q. And have you received them since you have been with the company?

A. We have.

Q. Do you have a traffic department?

A. We have none.

Q. Who handles traffic and freight matters in your company?

A. The secretary and treasurer of the company, J. O. Lane.

Q. Now, I call your attention to Commission's Exhibit 2705-1 to 32, which represent copies of your invoices for the month of April with certain dealers. It shows on the invoices a certain freight rate. Who put that on the invoices of your company, Mr. Elcock?

A. A stenographer.

Q. And what is the source of the rate that she puts on there?

A. A paper that I had here a little while ago, 37524 right in front of you.

Q. And what is the source of the rates which appear on that paper? I think you had reference to Respondents' Exhibit 2820-A to L; is that correct?

A. That is right.

Q. For identification.

A. Yes.

Q. What is the source of those rates? Where does she get them from?

A. The freight rate tariffs; the freight tariffs. The Cement Institute freight books.

Q. Now, does your company sometimes fill in the freight rate on bills of lading before delivering them to the railroad?

A. We place the freight information on the order which is sent down from the mill to the shipping offices. I am not quite certain whether or not we place that information on the bill of lading, or not.

Q. I see. Well, tell me this, if you know, Mr. Elcock, whether or not Mr. Lane, I think you said his name was, uses The Cement Institute freight rate book to enter the freight rates on your invoices and on this slip which you say is sent down to the shipping departments?

A. He might on occasion. I do not see why he should not; he ordinarily knows those things by heart, doesn't pay any attention to them. It is a convenient way of getting them.

37525 Q. Do you know whether or not your company, since you have been there, has had any occasion to choose between using the rates shown in the Institute rate book and using some official tariff?

A. Yes, sir.

By Mr. Werle:

Q. And do you have any policy with respect to that?

A. Use the lowest of the two, the lower of the two which happens to be the freight tariffs.

Q. On that occasion?

A. Yes.

Q. Do you have more than one occasion in mind as to that?

A. That is the only one I can remember.

Q. I see.

Could you carry on your business and meet prices, as you say you do, without The Cement Institute freight rate books?

A. I certainly could.

Q. Is your company equipped to compile a book of freight rates of that character?

A. It is not.

Q. If you had no Institute freight rate book what
37526 would you do?

A. We would have to go after the freight tariffs, that is all. We would eventually have the thing worked down to where we would be able to make out a sheet like that for ourselves.

Q. Tell me whether or not there is any understanding or arrangement or agreement between your company and any Respondent regarding the use or non-use of the Institute freight rate books?

A. No, sir.

Q. Now, when there are changes in the freight rates in the area where you are selling, what has been the practice of your company as to whether or not you reflect the changes in the freight rates in your prices?

A. We follow what we find the others doing.

Q. Now, have you found that every time there is an upward or a downward revision of freight rates that it has been reflected in prices that you found in the field?

A. Found all downward revisions reflected immediately; upwards, sometimes you never get.

Q. In your experience, has there been any decrease in freight rates which was not reflected in the prices that you found that had some relation to freight rates?

A. No.

Q. Now, I think there is some reference in the record to a change that occurred by some companies in the
37527 area where you are selling with respect to prepayment of freight.

Have you had any practice with respect to that?

A. We have always shipped freight collect except to points where there was no agent to collect, prepay stations, so-called, until January of this year when we were informed by dealers that certain companies had sent representatives in there and told them that in the future they would prepay all freights. We were forced to do the same thing within 48 hours.

Q. You say you were forced to do the same thing. What do you mean by that?

A. You either did it or you would not get the business.

Q. Did you know before you learned of this in the field that some companies were going to do that?

A. I did not.

Q. Or somebody was going to do it?

A. No.

Q. Did the salesmen of your company carry Institute books?

A. One does.

Q. As to the others, what information do you give them as to prices?

A. Furnish them the prices on a different list.

Q. Is that list of a character similar to Respondents' Exhibit 2820-L, for identification?

A. No. It is a loose-leaf notebook with the name
37528 of the dealers in each given town, and the price at that point given right in there. We give him that when he goes out in the field.

Q. Now, can you give us, Mr. Elcock, your best knowledge as to how many dealer customers your company has?

A. Oh, I would say, offhand, that we probably have 300.

Q. And can you tell me approximately what percentage of your total sales are made to dealers?

A. Around 80 percent to dealers; 20 percent to contractors.

Q. Does your company have a written definition of a dealer which you follow?

A. We do not.

Q. What are the factors which your company stresses in the selection of its dealers?

A. If he looks like a dealer and has a little money we will sell him.

Q. Do you have any requirement that he shall handle a full line of building materials?

A. Well, we had that in our minds, but we do not use it very much.

Q. What has been your experience as to whether or not competitor's companies sell to persons whom you do not consider dealers?

A. My experience has been they will sell to anybody who even looks like one.

Q. To what extent, if any, has the Southern
37529 States Company been influenced in the selection of its dealers by the fact that some competitors have or have not treated them as dealers?

A. We do not pay any attention whatsoever to what they do or what they think.

Q. Has it made any difference to your company in the

selection of its dealers whether or not the concern is a member of some dealer or building supply association?

A. It does not make the slightest bit of difference to us.

Q. Does your company have any policy with respect to selling a dealer at a point where you have another dealer?

A. Yes, sir; we most distinctly have.

Q. What is that practice?

A. We will not sell a dealer—that is, we will not sell a dealer at point A if that dealer comes from point B, provided we already have a dealer at point A.

Q. How long have you had such a policy as that?

A. That has been my policy as long as I have been in the business and have anything to do with sales.

Q. What is the reason why you have that policy in your company?

A. The common sense—if you did not do it you would lose the other dealer.

Q. Did you or did your company adopt that policy as the result of any agreement or understanding or influence of any dealer or building material supply association?

37530 A. We did not.

Q. Or as the result of any influence, agreement, or understanding of any Respondent?

A. No, sir.

Q. Did you ever hear of the Kentucky Retail Lumber Dealers' Association?

A. Yes, sir.

Q. Did you ever hear of Mr. Leo Klarer, secretary of that Association?

A. Yes, sir.

Q. Did you ever meet him?

A. No, sir.

Q. Do you recall whether or not you ever received any letters from him or the Association with respect to selling cement?

A. I expect I have received a dozen from him.

Q. What did you do with them?

A. Threw them in the wastebasket.

Q. Did you ever adopt any practice or policy of your company as the result of the influence of the Kentucky Retail Lumber Dealers' Association?

A. No, sir.

Q. Or as the result of any understanding or agreement with that Association?

A. No.

Q. Or through the influence or as the result of
37531 any understanding or agreement with any other dealer or building material supply association?

A. No.

Q. I now want to show you Commission's Exhibit 933-7-P and 7-Q, and ask you whether or not you recall that letter?

A. Yes, sir.

Q. In the first paragraph of that letter there is a reference to a card that the Carolina Building Institute was asking salesmen to carry. What does that refer to?

A. That card was to indicate that you were an associate member of the Carolina Building Material Institute, and the theory behind it that if you exhibited this card to a given dealer that he in turn would give you an order. It was a racket just like the rest of the building material dealers' rackets.

Q. How did you find out about that card?

A. We found out about it from my salesmen in South and North Carolina.

Q. Did salesmen of your company ever carry such a card as that?

A. They did not.

Q. Now, will you explain the circumstances which induced you to write that letter, Commission's Exhibit 733-7-P, is it, and 7-Q?

A. 7-P. Yes, I will be glad to.

Our salesmen in North and South Carolina
37532 brought this in to our attention. We had instances of this kind before, and, as I said in the beginning, it is just a racket, the whole thing, but this was a new man we had in there, and he kept insisting that someone ought to talk to these dealers, nobody in the whole cement business would talk to them, and I finally agreed to go up and talk to them, and I did go up and talk to them, and I explained to them the reasons why I would not take out any card.

The letter shows here they were not satisfied with any statement from small fry, they wanted somebody big, and they asked me who the best man in the industry was, and I told them John Bowen, because he is one of the two or three men in the industry I would trust, and they asked me if I would take it up with John and see if he would be kind enough to come down and talk things over with them, and I wrote him this letter, and he, I believe, did come down and talk things over with them.

I do not think there is anything wrong with that letter.

37533 Washington, D. C.,
April 26, 1940.

37534 Mr. Wooden: Your Honor, since I do not expect to be in the hearing room today very much, and it may be that I will not be at the New York hearings next week, I would like to make a very short statement.

Trial Examiner Norwood: Yes.

Mr. Wooden: In view of the estimates given a couple of days ago by Mr. Leisure that the defense of clients represented by his firm will run some thirty-four to thirty-eight weeks under the present schedule of hearings, I wish to enter in advance my objection and protest over any proposed recess of a week's time following next week's hearing in New York.

Respondents have sought and obtained many recesses, many of them over our objection, and our objection to this particular one, if proposed, comes with all the more force under the present circumstances.

37535 Trial Examiner Norwood: I will say, as far as I know, there is no proposal except from the Trial Examiner as to the suspension of the hearings after next week. As far as that is concerned, and as far as the hours are concerned, I have considered the convenience of counsel. Above that, however, I have considered the necessities of expediting this case, and I feel sure that I am having them put in the greatest number of hours that would permit us to continue without long recesses.

I am here on the job every day and the counsel on both sides come and go; and I am not going to

37536 lengthen the hours and lengthen the week's work longer than I think I can stand it without impairingy my physical strength and enabling me to make less time than more. I think we are getting the maximum out of it so far as the hours are concerned, and as far as an occasional recess goes. I carry these hearings on until I find it a little difficult to sleep and then I take a week off, and when that time comes I am going to have it off whether the counsel on either side want it or not; but I will say this, I think that the occasional week's recess will enable us to go right on with this without any summer cessation until the case is completed. We are not going to stop for anything.

So, I consider the counsel's attitude in the matter, and

will consider the attitude of counsel on the other side. I do not think we have made any mistakes as to the time, and so forth. It takes a good deal of nervous energy here to hear evidence and objections and motions all day long, and if you over do it you get a breakdown or it destroys the perspective. It certainly does not permit you to a day's work when you try to over do it.

Mr. Brick: I have no statement to make, if Your Honor please, on the subject. I think Your Honor has covered it completely, and I just want to mention that there have only been two weeks of recess since the Christmas holidays, and I think we have been going at a pretty good pace.

37538 W. B. ELCOCK thereupon resumed the stand and testified further as follows:

Direct Examination (Continued) By Mr. Werle:

Q. Mr. Elcock, yesterday when we recessed we were discussing Commission's Exhibits 9337-P and Q, which was your letter to Mr. Bowen of the Lehigh Company. With respect to that, after you wrote that letter, did you do anything further about the matter?

A. Nothing.

Q. Did you ever meet with the Carolina Build-
37539 ing Material Institute, and representatives of other cement companies?

A. Never.

Q. Did you take any measures with Mr. Bowen of the Lehigh Company, or any other Respondent with respect to the subject matter of that letter?

A. No, sir.

Q. In the second paragraph of that letter, you referred to a request from the Institute. What Institute were you referring to there?

A. The Carolina Building Material Institute.

Q. Yesterday, also, Mr. Elcock, I asked you some questions about deviations from published prices. In connection with that, have you found that these have occurred, or have you made them to all classes of customers, or what is the situation with respect to that?

A. No. Those are made to contractors, not made to dealers.

Q. Now, you told us, I think, that about 80 percent of your sales were made to dealers and the remainder
37540 are direct sales; is that correct?

A. That is correct.

Q. What has been your experience as to whether or not such direct sales have been increasing or decreasing?

A. Direct sales in the industry are increasing.

Q. Can you fix any particular periods of time in your experience that you have noticed that?

A. No. It is a very gradual process. One company goes out and sells a particular class of work direct, and the next time that class of work comes around we find a number selling it direct.

Q. Well, has it ever happened that there is a certain kind of work coming up that you would ordinarily sell through a dealer and your dealer tells you that he does not want to bother with it, and asks you to sell it direct; does that ever occur?

A. It has occurred in my time, yes.

Q. What do you do under those circumstances?

A. Sell it direct.

The witness identified Resp. Ex. 2821 as a copy of the announcement sent out by Southern States as of that date. The announcement was made before his time, and he cannot say whether his company sent copies of such announcements to competitor companies. His practice has been never to send it to any competitors.

37542 (RESP. EX. 2821, was offered and received in evidence.)

37543 Q. In connection with the questions which Mr. MacIntyre asked you, Mr. Elcock, is your company operating at the present time in accordance with any published announcement as to the kind of work you would sell direct, and the kind of work you would sell through a dealer?

A. Oh, I think there are changes, several changes.

Q. Well, do you have any published announcement of that character?

A. No.

Q. Since you have been with the company, has the company operated in accordance with some published announcement of that character?

A. More or less, yes.

Q. Well, what do you do when there is a question of

whether you are going to sell a certain kind of work direct or to a dealer,—how do you determine that?

A. The benefit of my own company only, taking all factors into consideration.

Q. Well, what are some of the factors?

A. What harm it may do with the dealer situation somewhere, what I think other people are going to do, try to guess them, and do what is best for my company.

Q. Why is it that you do not sell all of your
37544 cement direct and eliminate the dealer?

A. I wish it could be reversed. I wish I could sell all of my cement through the dealer. I would very much prefer to have it that way.

Q. What is the reason for that practice?

A. That is the steady day-to-day business that keeps you going. Contractors ship out in spurts and starts, go good one month and down the next month. I hope sincerely I will be able to so organize my business I will never have to touch a contract and have nothing but dealer business.

Trial Examiner Norwood: Contracts bring in some extra volume, do they not?

The Witness: You bet they do, Judge; you bet they do. They help you for a little bit, but there is that inevitable lull after the contracts, and the dealer business comes in day to day. It does not take a lot of worry and sweat getting it. The contracts do.

By Mr. Werle:

Q. Well, Mr. Elcock, Commission's Exhibit 547-3-W to 3-Z purports to be minutes of a meeting of the Sixth District of the Institute in Knoxville, Tenn., July 17, 1935. These minutes show that you were present at that meeting; is that correct?

A. Yes, sir.

Q. During that meeting of the Institute on that
37545 occasion was there any discussion of marketing methods and sales direct or through a dealer?

A. I do not remember, Mr. Werle, if there was.

Q. Did you remain there at the Farragut Hotel?

A. This Institute meeting?

Q. Yes.

A. Yes.

Q. For how long a period were you there?

A. As a matter of fact, I remained over night, got in a poker game.

Q. Now, after this Institute meeting broke up, do you recall whether or not at that time there was any discussion of selling direct or through a dealer?

A. I heard one sample of it, one example of it, that is conversation.

Q. Can you tell me about that, please?

A. I heard Ed McGovern, of the Hermitage Portland Cement Company, he was standing with a group of men, and I approached that group, and I heard him ask Bob Baker, sales manager at Chattanooga for Penn-Dixie, about some job which Bob recently had sold direct. It was a bridge job, and I heard Bob say yes, that he had sold it direct, and I heard McGovern say, "Is that your policy?" and he said "Yes, it is my policy."

Now, that is the sum and substance of what I heard. I did not stay there.

37546 Q. Did you participate in it?

A. No. I happened to hear that conversation. That is all.

Q. And did you remain and continue with this discussion that was started?

A. No, sir.

Q. Did you on that occasion or at any time ever enter into any agreement or understanding or arrangement with any other Respondent that you would follow or adhere to any such document as the one I now show you, which is Commission's Exhibit 547-4-D to 4-J.

A. I never enter into any agreements with any competitors, Mr. Werle. I operate my own business.

Q. And that covers this document, does it?

A. That covers that document.

Q. Does your company have any policy or practice with respect to diversion of cement in transit?

A. No, it does not amount to anything.

Q. Well, do you have—have you had any occasion where that has occurred in your area?

A. I understand from men who are with the company and who were there prior to my coming with them, that they did have several small instances of that trouble. I have had none since I have been there.

37547 Q. Now, does the Southern States Company make deliveries of cement to customers' trucks at the mill?

A. It does.

Q. Do you have any particular policy with respect to such deliveries?

A. No, sir.

Q. And during the period that you have been with the company since July of 1935 have you had requests from time to time for delivery of cement to customers' trucks at the mill?

A. I have, sir.

Q. And has it or has it not been your practice to honor such requests?

A. All have been honored except one.

Q. And will you tell me the circumstances and the reasons why you did not honor this one?

37548. A. I will be very glad to.

We had a truck man dealer in Blue Ridge, N. C., —up in your country, Judge. And he used to truck some metal of some kind, or mineral of some kind, rather, down to Cartersville, Ga., which is 22 miles away from my mill, and he never had a load going back, and it was a very easy thing for him to come over to my plant and we put a load of cement on for him, and he would take it back; and I let him do it until one morning—I happen to live at the mill, the office, he called me at half past three in the morning and wanted me to route a crew out and load a truck for him right then and there, and I absolutely refused to do it. He told me over the telephone what he would like to have me do with the cement. I do not believe the Judge will permit me to tell what it was, and he has not trucked any more.

Q. Is that the only occasion since you have been there that you have refused to load a truck?

A. That is correct.

Q. In Commission's Exhibit 976-15-I, which is a report made by your company to Messrs. Burns and Clark, there is some reference to the elimination of trucking by the Southern States Company. Let me ask, first, do you know anything about the company having eliminated trucking?

A. No.

Q. At any time?

37549 A. It never did.

Q. When you came with the company, was there any policy or practice of refusing to make deliveries to trucks?

A. No.

Q. Have you made any extra charge for deliveries to trucks?

A. None.

Q. Do you have any understanding or arrangement or agreement with any Respondents as to whether or not you will or won't load trucks at your mill?

A. None. We will load them.

Q. What has been the experience, your experience, Mr. Elcock, as to the use of trucks by contractors on large paving projects in your area? Have you found such contractors using truck delivery?

A. I have had contractors on road jobs very close to my plant come to me and ask me to let them truck. I told them that I would be very glad to let them truck, but I wanted them to go and look at our situation first, see what could be done. A road contractor, when he is hauling concrete, will take out about 900 barrels of cement per day. My machines will pack about 275 barrels an hour. With the ordinary business which goes through the plant, it is impossible for us to also load contractors' trucks at the same time, and contractors who have asked me for the privilege have agreed with me that it would be foolish for them to attempt to do it, but I have always told 37550 them that, "If you can see any way clear where I can do it and keep you going, I will do it for you."

Q. Well, with respect to that, as I understand it you discussed this matter with contractors?—

A. Yes, sir.

Q. —from time to time, and after you explained to them your situation, as you described it here, what have they said or done about it?

A. They have taken the cement in carload lots.

Q. Was that because you had made any refusal to give it to them the other way?

A. No, sir.

Q. Has the market area of your company been affected in any way by truck delivery?

A. Not at all.

Q. Do you sell in any markets or areas where you meet competition from foreign cement?

A. Yes, sir; tried to, didn't have any luck doing it.

Q. Well, in what areas do you find foreign cement?

37551 A. We do not find much of it now, thank goodness, but you did find it in Charleston, S. C., Brunswick, Ga., Savannah, Ga., Jacksonville, Fla.

Q. Has the Southern States Company ever refused to sell dealers who handled imported cement?

A. I have no memory, Mr. Werle, of any dealer who handled imported cement asking me to give him domestic cement.

37552 Q. Will you look at Commission's Exhibit 2657, Mr. Elcock, and tell me whether you know anything about that letter? At the time was that subject matter called to your attention?

A. No.

Q. And do you recall that that letter ever came to your attention?

A. I never saw it.

Q. Who is, do you know, Dan Long, who is referred to here?

A. Dan Long was a close personal friend of mine of a great many years' standing; dead now.

Q. What was his position at that time, do you know?

A. When he died he was—

Q. No, at the time of this letter in October, 1930.

A. As far as I remember, he was out of a job.

Q. And prior to that, how had you known him?

A. Oh, I had known Dan when he was with the Atlas Portland Cement Company in Birmingham back in 1921 or 1922, and for all the years since then, and Dan, as a matter of fact, was assistant general sales manager of the Atlas Portland Cement Company by which I was employed, and in the merger of the Universal and Atlas, when that took place, I believe late in 1929.

Q. Now, had he been at some time associated with any other cement manufacturing companies?

A. No.

37553 Q. Now, who is Mr. N. A. Kelly, do you know him, referred to in this letter?

A. I do.

Q. Who is he?

A. He was at that time, I think I can describe him as eastern sales manager for the Universal-Atlas, and was my superior.

Q. Now, did Mr. Kelly ever take up with you the matter mentioned in this letter?

A. He did not.

Q. Did Mr. Stone?

A. Never.

Q. While you were district sales manager of Universal-Atlas of New York, did that company have a policy with respect to selling dealers who handled foreign cement?

A. I did.

Q. Did you have anything to do with the adoption of that policy?

A. I strongly urged the adoption of the policy.

Q. And did you have anything to do with carrying the policy out?

A. I did.

37554 Q. Did you have a blacklist of dealers who were handling foreign cement at that time?

A. I do not like the term "blacklist." I could name off to you several dealers whom I refused to sell.

Q. And how did you find out about dealers who were handling foreign cement?

A. You would see their trucks running all over Brooklyn, where it existed, where the most of it was, with the foreign cement on it. It wasn't any secret.

Q. Well, did you cooperate with other cement manufacturers in carrying out your policy?

A. I did not care what the other cement manufacturers did. I still think it was a good policy of my company to refuse to sell it.

Q. Do you know Mr. J. J. Ryan, of Ryan & Company, New York?

A. I do.

Q. Did you have any occasion, or did you on any occasion discuss your company's policy concerning imported cement with him?

A. I did.

Q. Can you tell me when and where and what the discussion was?

A. Oh, I cannot remember the exact time, Mr. Werle. It was whenever that was going on in New York City. My discussions, I believe, occurred right in Joe's office with him.

37555 Q. And can you tell me what the discussion was?

A. Oh, Joe would do a lot of crying and begging and pleading he was in trouble, he had jobs where Atlas cement was specified and he did not get it, begging relief of some kind.

Q. And what did you tell him?

A. I told him he could not have it until he quit handling foreign cement.

Q. Is that about the substance of the conversation?

A. That is right.

Q. Well, will you look at Commission's Exhibit 1176, please. Do you recall that letter?

A. I presume this letter came in to me. I do not particularly recall it.

Q. Did you write that letter?

A. No.

Q. Did you dictate the letter?

A. No.

Trial Examiner Norwood: Let me see it when you get through with it.

(Mr. Werle hands the letter to the Trial Examiner.)

By Mr. Werle:

Q. Did you on the occasion of this discussion with Mr. Ryan tell him that you would try to persuade other manufacturers to sell him?

A. I do not see any reason why I should try to 37556 persuade other manufacturers to sell him.

Q. Did you tell him that there was going to be a meeting of manufacturers about that subject in New York, and you would take the matter up there?

A. Mr. Werle, I was just a common ordinary little district sales manager. I would not know anything about meetings in New York.

Q. Well, did you tell him that?

A. I do not remember telling him any such thing.

Q. Do you recall whether or not you told Mr. Ryan that he would have to write you a letter stating that he was no longer going to handle foreign cement?

A. I think it is entirely likely that I did tell him so.

Q. And what was the reason for telling him that?

A. I would not believe him otherwise.

Q. Was that part of any arrangement that you had with some other cement companies regarding selling a dealer who handled foreign cement?

A. I had no arrangement with any other cement companies, Mr. Werle.

Q. I think the quotation form of your company and the invoices which are in evidence show your discount terms to be 10 cents in 15 days; is that correct?

A. That is correct.

Q. And how long have those been the terms of your company?

37557 A. They were in force in my company when I went there, and I believe they had been in force for years prior to that.

Q. Are you using those terms as the result of any arrangement or understanding with any other Respondents?

A. No, sir.

The witness identified Resp. Ex. 2822 A-B as a Southern States specific work sales contract, which is the form the company is using at the present time. He happens to know that it goes back to 1919. How far beyond that it goes, he does not know. He knows it goes back that far because his old sales manager who died last year had a copy of every contract back to that time.

Trial Examiner Norwood: Is that different from the sales contracts that are being generally used in the trade?

37558 The Witness: I have not the faintest idea what anybody else has on their sales contract, judge; I do not know.

Trial Examiner Norwood: You do not know if it is the same?

The Witness: I do not know if it is the same or different.

Trial Examiner Norwood: Have you ever compared them?

The Witness: No, sir.

By Mr. Werle:

Q. During the period that you have been with
37559 the company, has any change been made in this form?

A. One thing.

Q. Yes.

A. When I came in the owners of the company made a suggestion that they would like to have that (indicating) put on.

Q. That is the seal of the company?

A. The seal of the company; that is the only change.

37560 (RESP. EX. 2822-A and 2822-B, was offered and received in evidence.)

Q. Yesterday, Mr. Elcock, I was asking you about the operation of your plant, and I did not ask you whether or not the plant had ever run at full capacity.

Will you tell me that, if you know?

A. I can.

37561 Q. Did it?

A. It ran from 1919 until 1928 full capacity.

Q. With respect to the contract form of your company that we have just been discussing, Respondents' Exhibit 2822-A and B, are you using that form by reason of any understanding or arrangement or agreement with any other cement company?

A. No, sir.

Q. Now, I show you Commission's Exhibit 1339, which is and purports to be an invitation for bids called for by the Procurement Division of the Treasury Department, to be opened on April 15, 1938.

Do you recall that invitation?

A. I most certainly do.

Q. Did Southern States submit a bid in response to that invitation?

A. It did.

Q. Prior to the time that you submitted a bid, did you have any discussion in your company with respect to that invitation?

A. No, sir; I had none.

37562 The witness identified Resp. Ex. 2824 A to Z7 as the file copy of the bid of Southern States on that request; Resp. Ex. 2823 as a letter which accompanied the bid. The file copy of the bid and that letter contains all of Southern States terms and conditions of sale in connection with that bid.

37563 (RESP. EX. 2823, 2824-A, to 2824-L, 2824-M,
37564 2824-N, and 2824-Z-7; were offered and received in evidence.)

Q. This bid, Mr. Elcock, shows f. o. b. mill prices of your company under bids of zone 7-A, item 1, $2.20 in cloth, $1.95 in paper, and $1.75 in bulk. Can you tell me how you arrived at those prices?

A. I certainly can, Mr. Wertle.

It was my guess that the entire industry was going to bid on this thing. I was going to bid on it anyway, because I did not want any further tangling up on this thing, and I tried to arrive at a price which would potect my little company in that teritory where it has the lowest freights,

taking into consideration all of the factors that are concerned with that, land grant rates as well, and I felt that in view of the current prices charged by other companies that I might be able to get a little business in that territory surrounding my mill on this price.

Q. Now, you said you thought other people were going to bid. Did you have any discussions or communications with other companies with respect to those?

A. I certainly did not.

37565 Trial Examiner Norwood: Were your prices at the other places identical with competition?

The Witness: Were my prices where, Judge?

Trial Examiner Norwood: At other places.

The Witness: This is only f. o. b. mill.

Trial Examiner Norwood: This is all f. o. b. mill?

The Witness: Only f. o. b. mill; bids were not asked any other way.

Trial Examiner Norwood: Well, how did they figure out at the destinations with respect to your competitors?

The Witness: By adding freight, I presume.

Trial Examiner Norwood: How do they figure out, the destination costs?

The Witness: I was the only bidder.

37568 By Mr. Werle:

Q. Did your company get an award on this bid, Mr. Elcock?

A. It did not.

The witness identified Resp. Ex. 2825 as a notification from the Treasury Department, Procurement Division, that all bids had been rejected. That refers to Resp. Ex. 2823 and 2824.

37569 (RESP. EX. 2825, was offered and received in evidence.)

Q. At the time that you received this invitation, did it conform to the usual character of invitation you were receiving from the Federal Government?

A. It did not.

Q. Can you tell me in what respects it differed, and whether or not you gave consideration to those differences?

37570 A. It asked for f. o. b. mill, whereas prior to that time—we had f. o. b. mill bid, whereas prior to that time we had been receiving invitations for delivered prices.

Q. And was there anything else that you recall?
37571 A. It asked for deliveries in less than carload lots. I do not remember any other differences.

Q. Well, let me see if I can refresh your recollection. Do you recall the provision in the invitation with respect to furnishing cement on any project where Government funds were involved?

A. Yes, I do.

Q. Did you give consideration to that feature of the invitation?

A. Well, I had to take a number of factors into consideration in determining whether I should bid on this thing, or not.

I knew, felt certain that I was going to be criticized very severely by dealers, because, as I understood this invitation, the Government could have taken my cement, for instance, and put it into a housing project in the City of Atlanta, and I would have been in very serious difficulties. But we were so desperately hard up for business that I was willing to take a gamble, anyway. I felt that I was doing and bidding on that thing what was the best thing for my company, the way I tried to conduct my business.

Q. Did the existence of this present proceeding have anything to do with your decision to bid?

A. No, I do not think so. I might have taken that into consideration. I think I said before I do not want to get tangled up with the Federal Government. If they
37572 want things this way, all right, let them have it.

Q. Did you take any steps to find out why your bid was rejected?

A. I most certainly did.

Q. What did you do about it?

A. I arranged for an interview with Admiral Peoples, and I came up and saw him and hollered bloody murder, and got nowhere.

Q. Had there been any other bids in the same areas where your company submitted bids?

A. I think we were the only bidder.

37576 Q. Now, during your experience with Southern States Portland Cement Company, has the United States Government ever been your biggest customer?

A. Never.

Q. Have you found any advantage to your company in

dealing with the Federal Government as compared with other customers?

37577 A. None.

Q. Have you found that the Federal Government pays cash more often than your other customers?

A. No, sir.

Q. Does it observe your 15-day discount period more often than your other customers?

A. Less.

Q. Now, has your company used the clause which has come to be referred to in this case as the control clause?

A. Yes, sir.

Q. Can you state what was the reason why you used that clause in some of your bids?

A. We found it was adopted by other companies, and started it, thought it was good sense, decided to adopt it, and did.

Q. Did you come to use that by arrangement, by any understanding or agreement with any other Respondent?

37578 A. No, sir.

Q. Well, when the Government paid you for your cement, did they pay you for it f. o. b. cars your mill, or f. o. b. your mill, or f. o. b. some destination?

A. F. o. b. some destination, after deducting the freight.

Trial Examiner Norwood: Nobody understands the time there. You may fix the time.

Mr. Werle: The time includes all occasions where this company has used a control clause, and I am trying to find out whether the Government paid him a mill

37579 price on those bids.

The Witness: In those cases where the Government—where the cement was shipped freight prepaid—

Trial Examiner Norwood: Yes.

The Witness: —to the United States Government, they paid us the entire sum.

Trial Examiner Norwood: Yes.

The Witness: In those cases where it was shipped freight collect to the Government they paid us the sum at our mill.

By Mr. Werle:

Q. And in such cases where it was shipped on a Government bill of lading, where did they pay?

A. I think they paid net at the mill.

Q. Now, during the period at any time since the N. R. A. Code, on such occasions where f. o. b. mill bids have been requested, have you always used the control clause?

A. Not always.

Q. How have you determined whether or not you would use that clause?

37580 A. Using the method which I thought will bring us some business.

Q. Can you explain that a little further, how you arrived at that determination?

A. Well, again it is a question of using your best judgment, trying to figure out what the price is going to be at a given point, trying to figure out a method of getting the business. Sometimes we used the control clause and sometimes we have not used it.

Q. Now, since this Procurement Division invitation in April of 1938, what has been your experience as to whether or not the invitations to bid by the United States Government called for f. o. b. mill bids exclusively?

Mr. Paulson: Just a minute on that point. We are wasting a lot of time here on that point. The fact that he is asking about it, Does the United States Government, or has the United States Government issued invitations asking for bids f. o. b. mill. Now, we covered that. We had the purchasing officials of various departments of the Government, and they told us what invitations they issued. They are in evidence. If they want to add to that, they can recall those purchasing officials and show that our evidence was not complete or not correct. To ask this man his experience on that is simply to go a round-about way to—I don't know. It doesn't get any facts at

37581 all.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: I do not see the relevancy of that material, anyway.

I sustain the objection.

37582 Mr. Werle: If Your Honor please, I would like to make an offer of proof with respect to that.

Trial Examiner Norwood: I hope Counsel will make it brief.

Mr. Werle: I think I shall.

That since this Procurement Division invitation, is

37583 only one branch of the Government that has been asking for f. o. b. mill prices at all, and that is the Alabama Office of the Procurement Division, that the other Procurement Offices from whom this Respondent receives invitations have been calling for destination prices, and that the f. o. b. mill matter is the exception, rather than the rule, in the area where he sells.

I think that is the substance.

Trial Examiner Norwood: Are you prepared to show whether or not the Government's attitude in this, or the attitude of its various agents, is from choice or necessity?

Mr. Brick: Choice.

Trial Examiner Norwood: You are prepared to show that?

Mr. Werle: I think the very fact Your Honor brought out a moment ago, that the Government buys at the delivered price, or delivered cost, shows that it is a question of necessity.

Trial Examiner Norwood: Yes.

Well, I shall exclude the proffer and give the Counsel his exception. I do not think it is necessary to show any more along that line.

By Mr. Werle:

Q. Well, Mr. Elcock, then, in bidding to the
37584 United States Government where land-grant rates are involved, have you given consideration to land-grant rates?

A. Yes, sir.

Q. And will you tell us whether or not you have been able to get the land-grant rates from the railroads?

A. Get all we want from the railroads. Most of the time they are wrong, but we get them.

Q. Have you found them reluctant to give them to you?

A. Not in any way. They give you any you want.

37585 The witness testified that Resp. Exs. 2826-A and B, 2827-A, B and C, and 2828 were typical of the communications that he had received from the railroads in connection with land grant rates which he had requested.

Q. And are you able to produce the files of your company with respect to this subject matter prior to the issuance of this complaint, or was that part of the files that were destroyed?

A. That is all of the files of the Government prior—what is the date of the issuance of the complaint?

Q. July, 1937.

A. They were burned in March, 1937, so I can't produce anything further back than that.

Q. Would you say that these represent the complete file of communications that you have received?

A. I would.

37586 (RESP. EXS. 2826-A, 2826-B, 2827-A, 2827-B, 2827-C, and 2828, were offered and received in evidence.)

37588 The witness identified Resp. Exs. 2829-A to E and 2830 to 2834-A and B as records of bids and awards to the Alabama Procurement Division, on which bids Southern States was low mill bidder, but did not receive the award. These records were kept in the regular course of business and were used by Southern States in connection with subsequent invitations.

37589 Mr. Werle: These are not being offered solely for that purpose, Your Honor. They do show that this company has been the low bidder at the mill on a number of occasions, but they also show certain variations or differences in bids of the various bidders, and these have been taken as exemplary of a number of records that this company keeps, and we selected on the ones where this company was the low bidder and did not get the award.

Mr. MacIntyre: We object to the offer as incompetent, irrelevant, and immaterial.

If there is any thought of Your Honor receiving these, I would like the privilege of an extended voir dire examination to prove to your satisfaction that they are incompetent.

Trial Examiner Norwood: I shall sustain the objection. Counsel has an exception.

37592 Trial Examiner Norwood: Counsel knows that I
37593 have ruled a good many times and explained that evidence of this kind about matters happening after the date of the complaint will not be received, and I consider offers of this kind a waste of time.

Mr. Brick: But this offer is consistent with your ruling, Judge, because Your Honor said we can bring in f. o. b. mill bids of Respondents to show that there was not a continuation of a refusal on their part to bid f. o. b. mill, as that refusal is the reason why you permitted the Good Friday bids to come in. This offer is entirely consistent with that ruling.

Trial Examiner Norwood: No, that bore on matters that were brought up and were covered by evidence that was put in regarding practices shown to have existed prior to the complaint to throw some light on the subject.

Mr. Brick: Well—

Trial Examiner Norwood: Now, I have ruled, and I hope the Counsel has considered it final.

37597 By Mr. Werle:

Q. Mr. Elcock, with respect to the statement by Mr. MacIntyre as to the refusal, consistent and concerted refusal of your company to bid f. o. b. mill prior to the issuance of this complaint as the result of an agreement and a conspiracy with the other Respondents in this case, what have you to say about that? Is that correct or is that not correct?

A. It is not correct.

Q. Now, do you recall what the practice of your company was in the fall of 1935 with respect to bidding on Procurement work, W. P. A. work, direct or through the dealer?

A. Fall of 1935, I think, there was a change came
37598 along there. I do not know just exactly when. I think we were bidding through the dealer at that time. I hate to swear it.

Q. Well, if your practice was that you would quote the dealer on such work, and you received an inquiry from the W. P. A. direct, would you have bid on that?

A. No.

Q. Now, the record shows that your company is a member of The Cement Institute. In addition to the freight rate books, does your company receive the statistical service of The Cement Institute?

A. Yes.

Q. Have you received it since you have been with the Southern States Company?

A. Yes.

Q. Do these statistics come to your attention?

A. They do.

Q. Will you tell me what use you make of them?

A. Oh, I am interested in seeing how the business is going along, which one of my friends is doing a good business, and which one is taking a licking. That is the only particular interest I have in it.

Q. Do you obtain statistics of a similar character from any other source?

A. Bureau of Mines.

Q. With respect to your local area, do you obtain
37599 any information with respect to contracts and consumption?

A. Yes. That information is useful in projecting what you are going to do, figure out what capacity you are going to run your mill. It is particularly interesting right at the present time, because it shows prospects for better business down in my part of the country than any other part of the country.

Q. Do you use the information which you obtain through the statistical service of the Institute, do you use that in any way in connection with any plan for sharing business or allocating business?

A. No, sir; I do not.

Q. Do you use it in connection with some plan to control or curtail production?

A. No, sir.

Q. Is your company a party to any such plan as that?

A. Absolutely not.

Q. Has your company been?

A. Never.

37601 Q. Mr. Eleock, do you recall the Government exhibit to which we referred this morning, a letter purportedly written by Mr. N. A. Kelly to Mr. Fred Stone, which mentioned the names of Mr. Dan Long?

A. Yes.

Q. I don't think I asked you in connection with that whether or not you ever took up that matter with Mr. Long.

A. I was never asked to take it up.

Q. And did you ever discuss that with him?

A. With Mr. Long?

Q. Yes.

A. I did not learn until 2½ years after that where Dan Long had been and what he had been doing. Then he told me. He was the most close-mouthed human being that ever was. He would never talk about it.

Q. Now, just prior to the luncheon recess we were
37602 discussing the statistical service of The Cement Institute in connection with The Cement Institute. What has been the fact as to your company,—as to whether

or not The Cement Institute has interpreted or policed your company's policies, marketing methods and prices?

A. Not in any way, Mr. Werle.

Q. Has Southern States Portland Cement Company ever been penalized in any way by The Cement Institute?

A. No, sir.

Q. Have you felt that your membership in The Cement Institute has restrained or restricted the action of your company in any way?

A. Not in any way.

Q. I want to show you Commission's Exhibit 561, which is entitled "A Compendium of Established Terms and Marketing Methods." Do you recall that Compendium?

A. Yes, I think I have seen this thing.

Q. Have the Southern States Portland Cement Company had any understanding or agreement with anybody as to whether or not they would follow the practices set forth in that document?

A. We have not.

Q. As a matter of fact, are you familiar enough with the document to state whether or not the practices which are referred to in that Compendium were or were not the practices followed by the companies with which you 3603 had been associated prior to 1935?

A. I think I could answer that best, Mr. Werle, by saying that what is laid down in this Compendium is a good way to go along and merchandise your stuff. I think it is practices that have grown up through the years, that all people who have to merchandise a product see good methods under which to merchandise. I think you will find that practically all companies did market their materials in this way long before this.

Q. Now, are you familiar with the term "base mill"?

A. Yes.

Q. What does that term mean to you, Mr. Elcock?

A. It means a mill located at some point which can usually by some method of analysis find as a single price with which it attempts to market its product.

Q. How long has that term "base price" or "basing mill" been a familiar one to you?

A. Oh, I have heard about it for 25 years.

Q. Now, with respect to this analysis that you mentioned, how do you determine what the base figure is at a base mill?

A. By picking up a number of prices in the field and deducting the freight rates from given points, and you usually find that it works out some standard figure.

Q. Do you have any understanding with any other competitor that you will use certain mills as base mills?

A. I have not, Mr. Werle.

37604 Q. Or that you will quote certain prices at base mills?

A. I have no understandings of any kind with my competitors.

Q. And do you or do you not on occasions attempt to estimate what delivered prices will be by reference to some base which you have previously ascertained?

A. Yes, sir.

Q. Well, now, take the Atlanta market, for example. Will you state why it is that you just do not go into the Atlanta market and quote prices low enough to keep all competitors from coming into that market?

A. I do not believe that I could quote a price low enough to keep them from coming into the market. I do not think it would have the slightest effect except to materially lower prices.

37605 By Mr. Werle:

Q. Now, Mr. Elcock, do you have any understanding or any agreement that your company will quote prices identical with the prices of other companies?

A. No, sir.

Q. Or do you have any understanding or agreement that your company will quote prices which reflect some combination of some base plus freight?

37606 A. I can quote any price I please.

Q. Do you have any understanding or agreement whereby you maintain a particular price level in the area around your mill in consideration for your competitors maintaining some price level around their mill?

A. No, sir.

(The foregoing testimony beginning "Now, Mr. Elcock, do you have" was adopted by Georgia, Oregon, Giant, Utah, Standard and Vulcanite.)

Q. In connection with The Cement Institute freight rate books, I do not recall whether or not I asked you if they were or if they were not adequate for your shipping purposes in your company.

A. The handiest thing we have; use it all the time.

Q. Do you have any understanding or any agreement that you will use The Cement Institute freight rate book?

A. I have not.

Q. For a price quoting purpose or for any purposes—

A. No, sir; that is a lot of nonsense.

Q. Do you have any understanding or any agreement that you will or will not quote f. o. b. prices on Government work?

A. I have explained several times, Mr. Werle, I have no understanding or agreements with any of my competitors.

Q. Well, I understand that to be so, but I want to call your attention to certain particular matters here which I think—your specific denial will be important.

Do you now or have you ever had any understanding or agreement to forbid the delivery of cement to trucks
37607 furnished by customers, or to charge some differential for delivery to trucks?

A. No, sir.

Q. Have you ever or do you now have any understanding or agreements with any other companies or any Respondents as to the kind of work that your company would sell direct and the kind of work it would sell to dealers?

A. No, sir.

Q. Do you have or have you had any understanding or agreement to adhere to any particular terms or conditions of sale, including discounts?

A. No, sir.

Q. Mr. Elcock, one further question: Does your company subscribe to any Code of Ethics of The Cement Institute?

A. Did it or does it?

Q. Does it?

A. Not that I know of.

37608 Q. Do you have any understanding or agreement with any other Respondent that you will adhere to some Code of Ethics or Code of Practices, or anything of that kind?

A. No, sir.

Q. With respect to this Compendium that we discussed a moment ago, Commission's Exhibit 561, was that distributed to your salesmen, or anything of that kind?

A. No.

(The foregoing testimony beginning "Do you have any understanding or any agreement" was adopted by Georgia, Oregon, Giant, Utah, Standard and Vulcanite.)

Cross-Examination by Mr. MacIntyre.

Q. Mr. Elcock, a few moments ago you were discussing with Mr. Werle the manner in which you figured out a pattern of prices; do you recall?

A. Yes.

Q. When you find that pattern, it is the thing that you usually follow; isn't it?

A. Yes.

Q. Can you cite any instance which occurred during the period of July 1, 1935, and July 2, 1937, in your territory except port area, where you did anything other than follow that program?

A. Yes.

Q. Where?

37609 A. In Georgia.

Q. What point in Georgia?

A. I did it on several occasions with the Hardaway Contracting Company. I did it on one occasion, at least, with the Carroll Contracting Company.

Q. What percentage of your transactions did those transactions represent—that is, of the total?

A. Right at that time, a very considerable portion, Mr. MacIntyre.

Q. I mean as to the number of transactions; not barrels.

A. Oh, I would say a small percentage.

Q. One percent?

A. I would say more. I would say two percent, Mr. MacIntyre.

Q. It would not exceed two percent?

A. I do not believe so.

Mr. Werle: Two percent of what?

Trial Examiner Norwood: What?

Mr. MacIntyre: The total number of his transactions.

By Mr. MacIntyre:

Q. Now, Mr. Elcock, can you tell us any instance where, during the period of July 1, 1935, to July 2, 1937, that you made any bids f. o. b. mill on direct sales to the Federal Government for W. P. A. work?

A. I do not believe so, Mr. MacIntyre.

Q. Can you tell us any instance during that 37610 period where you made any f. o. b. mill bids to the Federal Government?

A. I do not believe so.

Q. That would be of sufficient importance for you to recall them if they had occurred, don't you think?

A. I think so.

Q. I believe you told Mr. Werle that you have, with one exception, honored requests of dealers for delivery of cement to their trucks at your mill; do you recall?

A. Yes, sir.

Q. When you deliver cement to their trucks at your mill, what prices do you charge them?

A. Usually charge them the price at the point where they were going to deliver the cement, less the freight to that point, I would say always.

Q. That is the destination of their location?

A. That is right; where they are going to use it.

Q. How many requests do you so honor, or did you so honor the first year that you were with your company there; just as a matter of estimate?

A. It is just daily, Mr. MacIntyre, ever since I have been with the company. We have one customer that takes cement from us every day by truck.

Q. To what destination?

A. Rockmart, just two miles away from our mill; a little bit more than two miles away.

37611 Q. What price does he pay?

A. He pays the Rockmart price.

Q. Delivered price?

A. Yes.

Q. Any other instances?

A. Well, we give it to anyone who comes along.

Q. Handled on the same basis as the Rockmart dealer?

A. No, he is the only one in Rockmart. The others is a freight to destination. It is a convenience for this Rockmart dealer because it is very easy to send his truck out and deliver. Of course we pack it on there for him, and if we put it in by car it would be a question of his unloading it, and I do not think—that is foolish.

Q. When you load that truck at the mill you charge him as these other dealers at destination, the price applicable at their destination?

A. That is right.

Q. And deduct the freight from that in order to get the price at your mill to the truck; is that right?

A. Yes.

Q. Who is responsible for that cement when they carry it away from your plant; that is, if their truck should be overturned and the bags became opened and dumped in the mud hole?

A. I would assume that he was responsible. I cannot see where we have any responsibility; we have
37612 nothing to do with the trucks.

Q. Who is responsible when you load it onto a railroad car and start it out, as a matter of practice, the railroad turns the car over into the river?

Mr. Werle: Just a minute. I object to that. That is a question of law as to who is responsible.

Trial Examiner Norwood: The objection is sustained.

Mr. MacIntyre: I asked the witness, though, as a matter of practice.

Trial Examiner Norwood: You may ask him what his practice is in the making of demands, collections, and so forth, but as to who is responsible is a legal question.

By Mr. MacIntyre:

Q. Who assumes the loss in cases like that, Mr. Elcock?

A. Loss and damage in transit by railroad car, Mr. MacIntyre, do you mean?

Q. Where the railroad car is overturned, and damage to the cement occurs.

A. We assume that responsibility for it.

Q. In the name of the dealer?

A. Yes, sir.

Q. That is when the cement was consigned to him.

A. Yes, sir.

Q. And file claims in his name with the railroad company?

A. That is right.

37613 Q. And credit his account with such refund as you get out of that claim?

A. Yes.

Q. Now, you told Mr. Werle a few moments ago that you found the freight rate books of The Cement Institute about the handiest thing that you could have around your office.

A. That is correct.

Q. For what purpose?

A. Very easy to check your freight rates, Mr. MacIntyre, instead of going through a lot of railroad tariffs.

Q. To check them from, say, Clinchfield at Birmingham to various destinations in Georgia?

A. Well, actually, Mr. MacIntyre, what we are doing there, checking our own freight rates. We do not have to check these other things. We know what the prices are. We do not use the book that way.

Q. The information, then, that appears under all the headline points in The Cement Institute freight rate book is of no use to you?

A. Why, I think it is of great use to me when there is a price change out in the field, and we pick up price data; yes, we use that information, checking back on points, but that is the exception, not the rule.

Q. Well, when you use it in that way, you use it to determine what a delivered price is by adding the
37614 freight under that headline point to what you know to be a base price at some of those points?

A. No. I think it is the reverse. I am subtracting from the price which I find the freight rate which is listed in that book to try to ascertain what they are making there at the mill.

Q. And once you find that, what do you do?

A. What do I do with it, then?

Q. Yes.

A. I keep that right close in my mind, Mr. MacIntyre, what it is.

Q. You do not use the book any further?

A. We use the book further. I use that book daily if a shipment goes to a point where we do not know the rate, and frequently when we do know the rate. We check ours on that.

Q. It is a matter of checking price; is that correct?

A. Well, now, you may want to call it that. It is not a matter of checking prices. It is a matter of checking freights, our use of that book. It is not a matter of checking prices.

Q. How do you know that the rates appearing in the book are the rates that appear in official tariffs, Mr. Elcock?

A. I think I assume that, Mr. MacIntyre, because I have never personally checked a rate.

Q. How do you find errors, such as this one that you referred to yesterday in The Cement Institute books
37615 without checking the official tariffs to determine

whether The Cement Institute freight rate books vary from the official tariffs?

A. I think that was in the days when there were prices being filed, as you know; it continued a little time after the Schechter decision, and the particular instance happened at Calhoun, Ga., and we found a discrepancy, and we found a rate, I think, that worked out to 5 cents lower per barrel than the rate given in The Cement Institute's book, and we acted on that, thought we had good grounds fo it; in spite of the fact that we acted on it we did not get the business, although it made a cheaper price.

Q. And you did not—

Trial Examiner Norwood: The railroad rate was higher?

The Witness: The Institute rate was higher, Judge, than the freight book.

Trial Examiner Norwood: And you used the Institute rate?

The Witness: We used the lower of the two, which was, as I remember it, the freight tariff.

Trial Examiner Norwood: And still you did not get the business?

The Witness: No, sir; lost the business.

Trial Examiner Norwood: Somebody else had a cheaper price than that.

37616 By Mr. MacIntyre:

Q. The information appearing in the freight rate books under the various headline points, other than the name of your mill is not used by you for your shipping purposes, is it?

A. No, sir; it is not.

Q. And cannot be used by you for your shipping purposes?

A. No, sir.

Q. Now, referring to Respondents' Exhibits 2826, 2827, 2828, is there any information in the form of purported land-grant rates appearing therein that you could use in determining transportation charges from your mill other than that opposite the name Rockmart?

A. I do not think I understand, Mr. MacIntyre.

Mr. MacIntyre: Read the question.

Trial Examiner Norwood: Please read the question.

(Question read.)

A. I do not believe so.

By Mr. MacIntyre:

Q. Why do you ask the railroads to send you such information?

A. Because we want to find out what prices ought to be bid in so far as we can and in an effort to meet competition.

Q. Can you point out any information appearing in these three exhibits purporting to be land-grant information opposite the names of any locations other than Chattanooga and Rockmart, other than applying from basing points to destination?

Mr. Werle: May I hear that question, please?

37617 Trial Examiner Norwood: Read it.

(Question read.)

Mr. Werle: I do not know what that question means.

Mr. MacIntyre: I believe the witness understands it.

The Witness: I think I know what you mean.

Trial Examiner Norwood: Yes.

Go ahead.

The Witness: But I do not think it is very clear there, Mr. MacIntyre, but I presume what you are trying to say—

Trial Examiner Norwood: Well, are there any points there that are not basing points?

The Witness: No, sir; nothing except my own.

By Mr. MacIntyre:

Q. In other words, all the purported land-grant information there except that opposite the name of your company is that applying between basing points and various destinations?

A. What you call the basing points; is that is correct.

Trial Examiner Norwood: Well, the railroads simply give you the land-grant rates from the stations you furnish the names of?

The Witness: Yes, sir.

Mr. MacIntyre: You did not ask for it from other shipping points than those that appear on that?

37618 Mr. Brick: Of course he did not. We concede he would not.

By Mr. MacIntyre:

Q. I believe you told Mr. Werle just before the lunch hour that the statistics that you secured from the Bureau

of Mines is similar to that that you receive from The Cement Institute; do you recollect?

A. Why, if I used that language, that is not quite correct, Mr. MacIntyre, because the Bureau of Mines is lumped together and what I get from The Cement Institute is individual companies.

Q. Now, can you point out to us, Mr. Elcock, any instance during the period July 1, 1935, to July 2, 1937, wherein your company submitted a bid to the United States Government without using the so-called control clause?

A. I do not remember that; I am not familiar with that, Mr. MacIntyre, at all. Mr. Cowden, who is now dead, was handling that, and I have no information on that at all.

Q. Now, referring to Respondents' Exhibit 282? A, B, that is your specific work contract form; do you recall it?

A. Yes.

Q. I believe you told us that that had not changed since 1919.

A. Yes, sir.

Q. Can you say the same thing with respect to 37619 your specific sales order form and your sales contract form?

Mr. Werle: The witness has not said he had any specific sales order forms.

Mr. MacIntyre: Can't we find out?

Mr. Werle: Well, why don't you ask him? Sure, you can find out. I object to the assumption in the question.

Trial Examiner Norwood: Didn't you put in evidence here some contract forms?

Mr. Werle: I put in one contract form, yes, specific job contract, and he is asking him whether the same thing is true with respect to other contract forms, and he has not established that the witness has any others yet.

I think you ought to ask him if he has any others. If he does, then, all right.

Trial Examiner Norwood: Do you have any others?

The Witness: I do not believe we do, Judge.

Trial Examiner Norwood: All right.

By Mr. MacIntyre:

Q. What about the sales terms and conditions that appear on your quotation forms, have you made any changes in those since 1935?

A. I think I could answer that absolutely no, Mr. MacIntyre.

Q. Can you say the same thing with respect to changes that occurred on those quotation forms between 1930 and 1935?

A. I cannot, no.

37620 Q. You do not know whether changes occurred on those during that period or not?

A. No, sir.

Q. And you do not know whether your company had a sales contract during that period before you went with it, that was changed from time to time during the period 1930 to 1935, do you?

A. Wasn't this a specific sales contract that was talked about this morning?

Q. That is specific work contract.

A. I think that is the only form we have, Mr. MacIntyre.

Q. Since you have been with the company?

A. Yes, but I, knowing the history of the company, I think I could say that it went back long before that.

Q. It is not your testimony, though, is it, that your company did not have a specific sales contract that it used during the period 1930 to 1935?

A. No. I think I testified that I was morally certain that this same specific sales contract was used back in 1920, to my knowledge.

Q. I am asking you now whether or not it is your testimony that you did not also in that period have a specific sales contract?

A. Well, that is what this is.

Mr. Werle: Your Honor please, I think that is 37621 what this is, a specific sales contract here. Why don't we take the exhibit and let counsel look at it and let the witness look at it, and then they will know what they are talking about.

Mr. MacIntyre: That is a specific job contract, and I know what I am talking about, Mr. Werle.

By Mr. MacIntyre:

Q. I am not asking about a specific job contract but specific sales contract.

A. That is the only one we have, Mr. MacIntyre.

Q. And is it your testimony that your company did not have a specific sales contract during the period 1930 to

1935, as distinguished from a specific work contract, such as shown by Respondents' Exhibit 2822?

A. To the best of my knowledge and belief, that would be my testimony.

Q. Well, is it your testimony?

A. Yes, sir; it is my testimony.

Q. That they did not have? That they did not have?

A. I cannot, Mr. MacIntyre—you cannot pin me down to something when I was not there, but knowing the company and knowing the character of people that were operating it, I think I know what they do. They have not changed a doggoned thing since 1902.

Q. I believe you told us that your company is a
37622 price follower normally, and that you knew a time when you made a price increase, January 1, 1939. Can you name any other instance during the period July 1, 1935, to July 2, 1937, where your company made any change in price other than adopting the prices which had been named by your competitors?

A. I believe I named several instances where I did.

Q. During that period?

A. July 1, 1935?

Q. Yes.

A. Well, I am referring to prices which I went out and made, change in the prices going after business; is that what you refer to, or do you mean a general price change?

Q. I am talking about a published price change.

A. No.

Q. You did not make any in that period?

A. No.

Q. You merely adopted those that had been named by your competitors?

A. Yes, sir. We are normally price followers.

Q. I believe you stated that one of your salesmen carries a Cement Institute freight rate book.

A. Yes.

Q. Who is he?

A. S. D. Easterby.

Q. What territory does he work?
37623 A. North and South Carolina.

Q. How many salesmen does your company have?

A. He is the only one—oh, how many salesmen does my company have? Five.

Q. Do any other salesmen cover those two States in addition to this one that carries the freight rate books?

A. No. He is the only one.

Q. What does he use The Cement Institute freight rate book for?

A. Well, I will have to explain that to you, Mr. MacIntyre. When I brought Mr. Easterby in he was far away from the mill. I had the handicap there of a very old man as a sales manager whom I could not induce to do anything at all. He was not on the job. He never asked anybody for an order. He was merely a telephone clerk, but there was nothing I could do about him. There was a good deal of business coming up in North and South Carolina in the way of highway work, and Easterby could not secure from Cowden prices, he just could not get him to give them to him. He would not answer letters. He would not do anything, and, accordingly, I took the bull by the horns and just had the rate book sent over to him so that he could figure out the prices for himself.

Q. And how did he figure the prices with the freight rate book?

A. You know very well how he figured them: He 37624 found out what what prices were to any given town, subtracted the freight rate from the point which he knew about, and it is a very easy matter to figure the price.

Q. That is, using this constant figure as a factor, and the other factor he got from The Cement Institute book?

A. He first found the price at any given town.

Q. Yes.

A. Now, having found that price he checked back for himself.

Q. Yes.

A. And found what you say, yes, it was a constant figure or factor, whatever you want to call it, and then when it became necessary to quote a new price to some unknown point, I presume that is what he did.

Q. He took that book and used that constant figure out of the freight rate book—

A. Yes, but if you think those books have anything to do with the price structure in this business, you are barking up the wrong tree, Mr. MacIntyre.

Q. Yes, but I am after facts, after this particular fact, now.

A. All right, sir. I will try to give it to you.

Q. That is what he does?

A. Yes.

Q. And when he gets ready to submit bids to the State highway department for maintenance uses he does
37625 that for all destinations; isn't that correct?

A. Yes, sir.

Trial Examiner Norwood: What was the answer?

The Witness: Yes, sir.

By Mr. MacIntyre:

Q. I believe your prices that you bid on this Government invitation, Commission's Exhibit 1339 here, the so-called Good Friday bid, was $1.85 at your mill without package?

A. No, it is $1.80 before discount at the mill.

Q. What discount is taken from that?

A. What is that?

Q. What discount is taken from that?

A. Ten cents per barrel for payment within 15 days from date of invoice, making a net of $1.70.

Q. How does that level of that price compare with the basing point prices at Birmingham as of that date?

A. It would have had the effect of reducing prices in the territory where I hope to sell, Mr. MacIntyre.

Q. I am speaking, though, of the $1.80, was that higher than or lower than the Birmingham base price as of that date?

A. That was slightly lower than the Birmingham base price, as I remember.

Q. The Birmingham base price was $1.75, wasn't it?

A. I think so, and I made it $1.70.

Q. $1.75, and the discount comes from it.

37626 A. No, no. I stand corrected. I think you are right; slightly higher than that.

Q. So you were 5 cents higher than the base price at Birmingham?

A. Yes, sir. I am not very familiar with those specific base prices, Mr. MacIntyre.

Q. And can you tell us whether or not that the time you turned this $1.80 price to the Government f. o. b. your mill you were taking lower mill nets, lower than that on other business that you were shipping?

A. Oh, undoubtedly I was.

Q. How much?

37628 The Witness: How much? I do not keep all those things in my head, but I will make a guess that I said 30 cents a barrel less in some places.

By Mr. MacIntyre:

Q. Now, do you recall Mr. Weile asking you about Commission's Exhibit 933-7-P and 7-Q, a letter from you to Mr. Bowen about this Carolina instance?

A. Yes, Mr. MacIntyre.

Q. You learned after you wrote Mr. Bowen that letter that he attended that meeting as you suggested, didn't you?

A. I think I ran into John Bowen in New York and asked him, and he told me that he did.

Q. And he informed you as to the results of the meeting?

A. I do not believe he told me a thing about it.

Q. What did he say about the meeting? You said he informed you he did.

A. The only thing I can remember him telling me, Mr. MacIntyre, I believe I am correct in this, that he took the same action that I did, that is, refused to do what this gang wanted.

Trial Examiner Norwood: That relates to the letter about those cards?

The Witness: This Carolina Building Material Institute.

Trial Examiner Norwood: That was an organization of dealers, was it not?

37629 The Witness: Yes, sir.

Trial Examiner Norwood: And what was their purpose with respect to the cards?

The Witness: They wanted us to take out, each company—I presume others were approached on it; I have never found where there was any racket yet they tried to get me in on it that they did not try to get the rest—I believe they wanted us to pay a hundred dollar bill, Judge, to become associate members, and they would give us this card, and my man would walk into a dealer's place and exhibit this card, and say, "I am an associate member, and the promise was that if he did that they would all give you business, and if you did not do it you were absolutely out.

By Mr. MacIntyre:

Q. Mr. Elcock, you have read Mr. Bowen's testimony in this record on that point, haven't you?

A. No, sir; I have not; I don't remember. And I have read a good deal of testimony, but I do not remember anything about what Mr. Bowen said on that particular point.

Q. Is it your testimony that you haven't read his statements on it?

A. It is my testimony that I have read a great deal of testimony in this record, Mr. MacIntyre, and I have—

while I might have read what Mr. Bowen testified,
37630 I have no remembrance whatsoever of what he testified.

Q. You answered some questions for Mr. Werle this morning about this meeting that you attended in Knoxville, Tenn., in 1935, of The Cement Institute. I now show you Commission's Exhibit 547-4-B and 4-C. I will ask you to state whether or not you received the 547-4-C that is, if you recall your receipt of that letter from Mr. M. C. Monday?

A. Yes, sir; I do.

Q. With its enclosures?

A. Yes, sir.

Q. Did you write Mr. Monday in reply to that, taking any exception to his letter?

A. I did not pay any attention to it.

Q. I now show you Commission's Exhibit 976-15-D and 15-N, inclusive, and ask you if you made that up as a reply to the Clark and Burns questionnaire for your company?

A. I was not employed by this company at the time of the Clark and Burns questionnaire—when it was made up.

Q. Do you mean it had been sent in before July 1, 1935?

A. Yes, sir.

Q. So you did not participate in its preparation?

A. Is there any—I believe I know nothing about this whatsoever. I did not participate in it in any way.

Q. Did you see a copy of it in the files of your company?

A. No. I have hunted that thing up and I can-
37631 not find it if it is there; I do not know where it is.

Q. Did you discuss with Mr. Cowden, or the others, the preparation of that?

A. No, sir.

Q. Mr. Cowden never mentioned to you the preparation of it before you came with the company?

A. If you knew Mr. Cowden you would know he never mentioned anything to you.

Q. Mr. Werle discussed with you Commission's Exhibit 584-G, a letter from Mr. Klarer to you and a number of

other people concerning this non-diversion stamp. Do you recall that?

A. Yes, sir.

Q. Dated December 18, 1935.

I now ask you to state whether or not the adoption and use by your company of the so-called non-diversion stamp was made shortly after the receipt of that letter?

A. I believe it was, and I would like to explain why, Mr. MacIntyre, if I may.

Q. All right.

A. I had had all of the grief in the world with this diversion racket in New York City. When I came down to Rockmart I did not know anything about what they had on the bills of lading or what they had on their invoices or anything else, and I paid very little attention to it, and I did not find—I did not even know that the diver-
37632 sion problem had ever occurred down there; and when this letter came to me I asked Mr. Cowden if he used such a stamp, put anything on there, and he said no. I told him I thought it would be a good idea. That letter serves as a reminder to me that there was a very considerable problem in the diversion business, and if you had been through it the way I had been through it in New York you would realize how bad it was.

Q. So after that, up until 1937, July 2, you continued using the stamp?

A. And after that.

Q. And one of the troubles you had experienced in New York with respect to these diversions was a market disturbance, a market price disturbance?

A. Yes. A market price disturbance which had the effect of one dealer cutting the price as much as 28 cents a barrel lower than the other fellow, and they were immediately competing with each other, and it was a headache all the time.

Q. That would not have been possible if you had been selling on an f. o. b. mill price to all of them, would it? They could not divert and get such advantages one over the other?

A. They could not divert, but you would have probably just as much trouble in New York City—have as much trouble as the other way.

37634 Q. Mr. Elcock, when you testified on direct that your company has and has had no understandings

with its competitors concerning terms and conditions and policies, marketing policies, and prices, and so on—you recall that testimony?

A. That is correct, yes. That is correct.

Q. Well, when you gave such testimony you did not take into account the action of the board of trustees of The Cement Institute on December 9, 1935, when it approved the Compendium, in this record as Commission's Exhibit 561, did you?

37635 A. I have no memory whatsoever of the board of trustees approving any Compendium. Whether they approved it or not would have made no difference to me.

Q. Your company was a member of The Cement Institute at that time?

A. Yes, sir. That did not mean that I played ball with them in any way at all.

Q. And it supported The Cement Institute, didn't it?

A. Well, it was in when I went down there to join this company. I did not see that it was of any tremendous benefit, but I hated to start making a lot of changes as soon as I came in.

Q. It has continued its membership and continued to support The Cement Institute, hasn't it?

A. Yes. I will tell you why if you want me to.

Q. Well, if you do not think it is clear—

A. The reason we stayed in it, Mr. MacIntyre, is because an attorney of Knoxville, Tenn., who represents the family which owns this mill, is a bug on being a member of any organization composed of members of an industry. Even if I wanted to get out I do not believe he would permit me to get out. He is a member of the board of directors.

Q. That is the reason you continued it?

A. That is just about the reason. Today, of course, I have got to stay in and pay the bills.

37636 Q. Now, do you recall your testimony on direct to the effect that when you were with the Portland Cement Association during the period of 1914 through 1915, and the period including 1919 to 1925, it had nothing to do with the marketing policies and practices in the industry? Do you recall that testimony?

A. I think I do, Mr. MacIntyre.

Q. When you gave that testimony you did not take into

account the action of the Trade Relations Committee of that organization, as is in evidence here in the form of Commission's Exhibit 3192 and 3193, during the years 1915 to 1919, recommending to the members of the industry that they adopt certain new marketing policies and trade conditions?

A. Of course, I, as a paid employee, would not know anything about these things, Mr. MacIntyre, at all.

Q. So you did not intend your testimony to be a denial that the organization as of the date did these things; you just wanted it to appear from your testimony that you did not participate in such activities, personally?

A. What I was trying to make clear is this, that the Portland Cement Association, as such—and by the Portland Cement Association I am referring more particularly to the group of paid hired men—and what I was trying to convey to you was that that group of paid hired men were under very, very strict orders that price was a word which just couldn't be mentioned, and was out; that the organization, as such, had nothing to do with it. Now, what
37637 some committee did I don't know anything about.

Q. You, in that connection, were not referring to its committees and board of directors?

A. I couldn't be, because I had no knowledge of any kind what they did.

Q. And one further question: When you became associated with the Portland Cement Association it was then operating under the name of the Association of American Portland Cement Manufacturers?

A. That is correct; in 1914.

Q. And it changed its name between the time that you first went with it—

A. That is correct.

Redirect Examination by Mr. Werle.

Q. Mr. Elcock, does the board of trustees of The Cement Institute have any authority from you to bind
37638 you or your company as to your marketing policies, your prices, or your marketing practices?

A. No, sir.

Q. Does any member of the board of trustees of The Cement Institute have any authority from you to bind your company for you, as to any of your marketing policies, or your marketing practices or your prices?

A. No, sir.

Q. Does any committee of The Cement Institute—and I am speaking in these questions of the present time and during the past while you have been a member of the Institute—does any committee have any authority from you to bind you or your company as to your marketing practices, your marketing policies, or your prices?

A. No, sir.

Q. The same question as to any officer of The Cement Institute?

A. No, sir.

Q. Now, do The Cement Institute rate books save your company any money, or don't they?

A. I certainly would consider that they save us money. It is a convenience. We have no traffic department. It just so happens that the man who died last year, who was secretary and treasurer and sales manager and traffic manager and purchasing agent, was an old traffic man, and he probably could get along without it; but after his
37639 death we could not have gotten along without employing somebody who had to work on rates.

Q. And having the Institute rate books, has that or has that not been necessary?

A. It has not been necessary. They are a very great convenience.

Trial Examiner Norwood: How much do those books cost a year?

The Witness: I have no idea, Judge. I don't know. We pay our dues, and I guess that is included as part of the service.

37641 Q. Now, you mentioned, in connection with the subject of diversions, that it was a lot of grief to you when you were in New York. Will you please explain in what way it was grief and what your objection to it is?

A. At the time when I was district manager, district sales manager, for the Universal-Atlas Cement Company it was possible to bring a carload of cement into what was known as the Bush Terminal, for one thing, at a flat rate of 38 cents per barrel; and at the same time there were other points in Brooklyn within two or three miles where the freight rate was as much as 63 cents per barrel, very widespread.

The dealers would give me an order for a car of cement to be delivered at the East New York yard, which took a

63-cent rate, and when the cement was in the process of coming over, at a cost of $2 or $2.50, they would order it diverted in transit, and have it put down at the Bush Terminal, and they would haul it that two miles and make 25 cents for themselves, with the result that two dealers located across the street from each other got into a price war pretty quickly. One had a price of 25 cents—cost 25 cents under the other fellow, and we just had to stop the thing in some way.

Business was going to go to pot. We had pressure brought on us by dealers who would not do the 37642 thing. And finally it became so great that we had to do something about it.

I do not remember whether we used any stamp up there on those things, but we certainly did try our level best to stop the diversions in transit.

Trial Examiner Norwood: When you stopped it, then the price of both was the same?

The Witness: Yes.

Trial Examiner Norwood: Did it go back to the higher level or the lower level?

The Witness: It would go—the price was the same, Judge. Where these fellows got away with it, they pocketed that difference in freight.

Trial Examiner Norwood: When you stopped it the price went back to the higher level, did it?

The Witness: Yes, sir.

Trial Examiner Norwood: Go ahead.

By Mr. Worle:

Q. Well, now, when you answered the Examiner—

The Witness: That is not correct, Judge. I am not correct. Your price in New York, as I remember it in those days, was, I think it was $2.42 a barrel in paper—I am just using an arbitrary figure—and the price to the customer who was doing the diverting, or the customer who was not doing the diverting was a standard 37643 flat price in New York City of $2.42 a barrel. Now, the fellow who did the diverting actually paid 25 cents less freight per barrel than the man who was not doing the diverting. Now, the delivered price did not change in any way. It did not either go up or down.

Trial Examiner Norwood: Then the man who had diverted undersold his competitor across the street?

The Witness: He did not. When he had that money in

his pocket, of course, he did undersell him, and it destroyed your market completely.

Trial Examiner Norwood: Then, that made him sell at $2.17, didn't it?

The Witness: I know he pocketed some and gave some of it away.

Trial Examiner Norwood: It made him sell for less than $2.42.

The Witness: It made it possible for him to sell for less than $2.42.

Trial Examiner Norwood: Well, did he sell it for less?

The Witness: Yes; on a great many occasions he did sell it for less.

Trial Examiner Norwood: And when you stopped diverting he could not do it; is that right?

The Witness: No; he could not do it.

37644 Trial Examiner Norwood: And you went back to $2.42, did you?

The Witness: Yes; $2.42 plus what the dealer would choose to charge as service.

Trial Examiner Norwood: Yes.

By Mr. Werle:

Q. Now, in connection with this diversion that the Examiner has just been asking you about, when a dealer got the cement for less by diversion, did that result in affecting the net to your company on that shipment?

A. Not in any way.

Q. So it was not your price that was affected?

A. No.

Q. It was the dealer's price; is that correct?

A. It was the dealer's.

Q. Now, you said that you did take some action in order to prevent that. Was any action taken by you taken in cooperation with or by any understanding with your competitors?

A. No.

Q. Now, Mr. MacIntyre asked you about the number of transactions where your prices did not reflect a base, I believe, and you said two percent of the number of transactions, I think. Can you tell us what percentage of your business that would cover during the period that he asked you about, from July, 1935, to July, 1937? In other

37645 words, were those any substantial orders, or were they small?

A. Very big.

Q. And as for the percentage of transactions with contractors, what was the percentage of transactions where your prices did not reflect a base, if you can estimate that? In other words, if it were two percent of all of your business, would the percentage be the same, or different, with respect to contractors' business?

A. Oh, I would say it was 75 or 80 percent of the contractor business.

37651 Q. Now, I think Mr. MacIntyre asked you a question, Mr. Elcock, which assumed that you have adopted the prices quoted by your competitors. Is that correct?

A. I do not adopt the prices quoted by my competitors. I attempt to meet the lowest price quoted by a competitor, and, as I told you before, sometimes beat it.

Q. Now, in the cases where you attempt to estimate or anticipate what the prices might be at a point by figuring back to some base, do you have any assurance or any foreknowledge that that will be the lowest price quoted at that point?

A. No, sir.

37652 *Recross-Examination by Mr. MacIntyre.*

Q. Mr. Elcock, on redirect Mr. Werle has asked you about the amount of money that you save through the use of The Cement Institute freight rate books. Now, I will ask you whether or not you can tell us that the use of those books would save you any money if you did not attempt to duplicate the information that is contained in those books showing freight rates from all the headline points other than from your own mill.

A. Yes, sir; it would cost us money.

Q. In other words, it is your testimony that it would cost you more to take rates out of the official tariffs from your mill to various destinations than it would to secure one-tenth of the information that you get in the freight rate books of The Cement Institute?

A. It costs us money each time we go to look up the tariffs.

Q. But when you compare the cost of the time
37653 that it would take to get merely the rates for your shipping purposes from the official tariffs, that is,

the rates applying from your mill to the various destinations, with the total cost of The Cement Institute freight rate books, what is your answer?

A. Oh, I think that the—I told the Judge a little while ago that I do not know what the cost of the freight rate books is. It is all included in the dues. I have no idea of the cost.

Q. Well, how can you state that it saves you money if you do not know?

A. I do know that it would take a lot of time and labor to get these things out of the freight rate tariffs.

Q. If you took the rates from all these headline points to all the various destinations to which you ship it would take considerable time?

A. Yes.

Q. But it would take you just a very small part of the time to get the rates from your mill to the various destinations by leaving out all these other shipping points.

A. It would take me much less time to get it merely from my mill.

Q. Now, can you use the rates for shipping purposes other than yours from your mill?

A. Yes, of course I can.

Q. I beg your pardon?

A. Yes, of course I can.

37654 Q. How do you use a rate that you determine is applicable between Birmingham and Blakely, Ga., for your shipping purposes?

A. I would use that rate in this way: When I find a price change of any kind for Blakely, Ga., then I get busy checking back what that means. In that way I use the rate book, and it is a very, very great time saver and a great convenience.

Q. For pricing purposes?

A. In an effort to meet competition and find out what is going on.

Q. For purposes of making prices?

A. No, it is not for purposes of making prices. My idea—

Q. What other purpose?

A. Well—

Trial Examiner Norwood: You have to make prices to meet competition, don't you?

The Witness: I am not trying to do a doggone thing but to meet or beat competition, Judge.

I am sorry. I do not mean to be—

Trial Examiner Norwood: You are under oath.

The Witness: I am sorry.

By Mr. MacIntyre:

Q. Well, Mr. Elcock, for what purpose will you use such information other than prices?

A. What do you mean? The information in these books?

Q. Such as shows the rate from Birmingham to Blakely, Ga.

37655 A. I told you just a moment ago, exactly why I used that, Mr. MacIntyre.

Q. I understood you, though, in that connection to say that you also used it for shipping purposes.

A. I use it for shipping purposes from my own mill, my own rate.

Q. But rates from other points to various destinations, how do you use that information?

A. Well, I have explained that I use it in checking back when I find a new delivered price. I use that rate to check back on these various headline points, so-called.

By Mr. MacIntyre:

Q. You also use them in figuring forwarding from the headline points to the various destinations?

A. No, sir; I do not.

37656 Q. What about Mr. Esterby?

A. What about him?

Q. Yes.

A. Mr. Esterby does not forward these things.

Q. Well, you told me a short while ago that he uses your freight rate books of The Cement Institute for North and South Carolina.

A. Oh, you are speaking about Mr. Easterby?

Q. Yes, Easterby.

A. Now, what do you want to know about him?

Q. How does he use them?

A. After he has found out certain prices existing at certain points he checks back. If any question comes along where there is a point that we do not know any price, he does use that, and he does that hoping to meet the lowest price.

Q. And if any question comes up about you making a price even in your home territory down in Georgia, where you have not already received specific information from

the field that there has been a price change, you use the same method; isn't that correct?

A. I think that is—you are going into a very, very remote possibility. It is right hard to locate any point in Georgia that we do not have the price.

Q. Isn't it a fact that in the two years that you were with the company before this complaint was issued

37657 that you did such things?

A. I would honestly say to you that I do not believe our sales manager ever touched that in those two years.

Q. I am asking you about yourself.

A. I never used them. I never used them at all.

Trial Examiner Norwood: Well, if such a situation should arise, is that the way you would handle it?

The Witness: What?

Trial Examiner Norwood: Using the books, the Institute freight rate books, in order to determine the price there?

The Witness: No, sir. I use that only as a Convenience. Those freight rate books, Your Honor, have nothing whatsoever to do with the price of cement. Anybody that thinks that is off on a wrong track.

Trial Examiner Norwood: Figuring the delivered price?

The Witness: They have nothing to do with the price, as such. They are not a subterfuge to maintain any price.

Trial Examiner Norwood: I am asking you how you use them with respect to making prices and to determining what your competitors' prices are.

The Witness: I take the basing point and I add the freight to the basing point.

Trial Examiner Norwood: The freight shown in the Institute books?

37658 The Witness: Yes, sir; the freight shown in the Institute freight books, because it is a convenient way to get it.

By Mr. MacIntyre:

Q. Now, another subject that Mr. Werle took up on your redirect is that of adopting prices of your competitors. Do your recall that?

A. Well, I do not adopt prices of my competitors, Mr. MacIntyre. I try to meet that competition, but I am not adopting anything.

Q. Do you adopt or use any prices that are any different from those that your competitors use?

A. Yes, sir; I have—

Q. I am talking about quoting your dealer trade.

A. No, not in quoting the dealer trade; no, sir.

Q. You do not adopt or use any prices of your competitors?

A. I meet the competition that I find in the field. I am not adopting a doggone thing.

Q. Well, do you use any different price in quoting your dealers than those of your competitors?

A. No, sir.

Q. You do not adopt any price different from those of your competitors, do you?

A. No.

Q. Can you cite us any policy or practice, Mr. 37659 Elcock, that you used in the marketing of your cement between July 1, 1935, and July 2, 1937, that was different from the practices and policies of your competitors?

A. I can cite you a number.

Q. Tell us about one.

A. I cited one to Mr. Werle yesterday, which was the Esty matter, where they made different prices.

Q. I am talking about policies now and marketing conditions in your terms of sale. Can you name anyone that is different from your competitors?

Mr. Werle: I do not think this is proper recross. I did not go into different marketing policies on redirect.

Trial Examiner Norwood: He may ask him about that. Objection overruled.

A. What do you mean? Ever change the terms and conditions?

By Mr. MacIntyre:

Q. At any other time than your competitors change them.

A. Yes, I do.

Q. Cite me an instance where you have.

A. My goodness, Mr. MacIntyre. I do not believe there is a company in the business that has not gone easy on its terms and conditions.

Q. Can you cite me any time where you have published terms and conditions and prices different from those published by your competitors?

37660 A. No, sir. We publish just as little as we can.

Q. You do not know of any where your published terms and conditions are different from your competitors?

A. No.

Q. Now, coming to these last exhibits that were received on redirect, Respondents' Exhibits 2835, 36, 37, 38 and 39-A to D, can you tell me how you use land grant information that you thus receive in computing and quoting prices?

A. May I see those?

A. Why, I believe the purpose of this was, when we found that—these were used principally on this Alabama work, where the W. P. A. was asking for bid destination and f.o.b. mill—we found that we were losing a considerable amount of business because somebody was bidding under us. We wanted to find out why, and we felt
37661 that it was advisable to get rates from all points that possibly could ship, and tried to check up on some of these rates.

It was occasioned, Mr. MacIntyre, by the fact that nobody could find out definitely what a rate is. As I said, they give you the rate, but most of them are incorrect, and after you bid you find that the Government had a different rate. We got that information, and we decided that it might be a wise thing to do to check up on this thing and see what was going on. So we asked for information for all points.

By Mr. MacIntyre:

Q. How did the different rates figure in any f.o.b. mill prices that you quoted the Government, whether they were different or not? What difference does it make?

A. You mean the different land-grant rates?

Q. Yes.

A. You want to know how we did it?

Q. Yes.

A. All right.

When we had a request for bids at these various points both ways, f.o.b. mill and f.o.b. destination, we quoted the current market price at the destination, f.o.b. destination price.

Q. That is, the commercial delivered price?

A. Yes. We figured to ourselves that these
37662 mills that previously had a fixed price, the Government was certainly going to take advantage of these

land-grant rates. We wanted to find out what our competition was going to be. We knew that they had more or less of a fixed price at the mill, and we added that price to the land-grant rate in arriving at a price there.

Q. In other words, you added the price from such fixed points—added to that price from such fixed points the land-grant rate applicable from those points to the destinations involved?

Trial Examiner Norwood: Do you understand that?

The Witness: I hope I do, Judge.

37663 By Mr. MacIntyre:

Q. Well, I will try to make it clear if you do not.

A. I would say yes, Mr. MacIntyre.

Q. All right.

A. I said "Yes."

Q. In other words, you find out what the basing-point price is and add the land-grant rate from that basing-point price at that basing point to the destination?

A. That being a—

Q. The Government destination cost, so-called, then deduct your applicable land-grant rate from that destination back to your mill and quote them the result?

A. That is right.

Q. Is that correct?

A. Yes.

Q. And you do not use land-grant information that you thus receive from the railroad companies, as is shown by Respondents' Exhibits 2835 to 2839, in any other way; is that correct?

A. I think it is.

Q. And the only reason that you secure information from non-basing mills such as Nashville and Knoxville is to determine what mill nets they would secure on the destination cost figured in the manner that we have just discussed; is that correct?

A. No, I do not think that is correct. I think what we are trying to figure out is where in the world they
37664 got some of the rates they are using.

Q. But you do not use in any way the land-grant rate information from Knoxville and Nashville to figure any Government destination cost, do you?

A. I do not see how. No, Mr. MacIntyre, I do not believe so.

Q. Well, how do you use it; then?

A. Well, I tried to—you are getting a little bit over my head on these things, because I am not doing this every day, and I do not think I am competent to answer the question.

Q. Is there any difference in the method you used at the time you were getting this information, as is shown by Respondents' Exhibits 2835 to 2839, from the railroads, and the practice you used when you first came with the company in 1935?

A. I do not believe this was being used at all in 1935.

Q. In 1936?

A. I do not believe there is any difference now.

Q. No difference.

You could not find in your files any information of this type and character that you received from the railroads during the year 1937 (showing documents to the witness)?

A. I could not say offhand, Mr. MacIntyre. I do not know when we started getting them.

Q. Did you make an effort to determine whether you had information of this character as of that date instead of 1939 and 1940?

37665 Q. I am talking about, when I say as of that date, 1937.

A. I do not believe I am competent to answer the question. I did not make any effort on the thing.

Q. Well, who selected these from your file?

A. Mr. Werle selected them, I presume. He has got the entire file over there.

Q. And do you know whether he made any effort to select 1937 instead of taking 1939 and 1940?

A. I haven't the faintest idea why he selected anything, Mr. MacIntyre.

Q. Do you know whether or not your files con-
37666 tained any for 1937?

A. I think that you have the entire file since that time that the fire occurred.

Q. Mr. Werle has it. I have never seen it.

A. Well, Mr. Werle has it. I haven't.

Q. Can you tell me whose handwriting it is that appears on Respondents' Exhibit 2835 on the upper left-hand corner?

A. Yes. That is the handwriting of our present secretary and treasurer, J. O. Lane.

Q. What does that mean?

Mr. Werle: I did not offer that.

A. What is it?

Q. Yes.

A. I presume it means what it says. It says "Old land-grant rates to November 29, 1939." I presume what that means would be that we discovered changes in those since then.

Q. That is, any rates that you had received on earlier dates, on these that you had received on this date, November 14, 1939?

A. No. I think these are the old ones, and since then we have later rates, new rates, as evidenced by—which was secured by the Government.

Mr. MacIntyre: I would like to ask Mr. Werle if he will produce the file from which these were taken so we may determine whether or not there are some in there for 1937. We raised the point on this question of in-
37667 formation as to 1939 and 1940 this morning, and now it develops that the witness made no selection, and he does not know whether he has 1937, or whether it was only 1939 and 1940. I think I am entitled to know.

Trial Examiner Norwood: I understood when I received those that the older ones were burnt up.

The Witness: Prior to March, 1937.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: Will Mr. Werle produce the file so that I may hastily glance at it?

Mr. Werle: I do not have the 1937 file, and I do not have the 1938 file with me. I have the files for the years 1939 and 1940. I did not ask for any files prior to that, because, in the first place, I assumed that they would not have them handy. These are the rates they had handy, and I brought them down.

Trial Examiner Norwood: Well, do you think that there are any of those in existence?

The Witness: No. I can explain that thing now, Your Honor. We started getting those land-grant rates in that form when the Government started asking for these things down in Alabama in this way, as to prices in this way, and to my best knowledge it started late in 1938, and I do not believe there are any before that.

Trial Examiner Norwood: You do not believe
37668 you have had any requests before that?

The Witness: No, sir. We never requested before that.

37671 New York, N. Y.,
April 30, 1940.

37674 L. C. LETZKUS was thereupon called as a witness for the Respondents, and, having been first duly sworn, testified as follows:

Direct Examination.

Mr. MacIntyre: If Your Honor please, apropos of the discussion we have just had off the record concerning the proposed stipulation of Mr. Letzkus, I want to state now for the record that we hereby offer to admit, stipulate, and agree that the Pittsburgh Plate Glass Company, through the present witness, L. C. Letzkus, stands ready to produce and may be taken to have produced and to have put in the record both oral and documentary evidence to the effect that it has employed the same methods for the same reasons and under the same conditions and circumstances as what the entire record may show or what
37675 it may show as made through any one or more particular witnesses with respect to Alpha Portland Cement Company, and all other Respondents whose evidence has been received heretofore concerning the following matters:

1. Use of basing points in quoting or selling at delivered prices;

2. Picking up information through its salesmen and customers as to competitors' announced changes in delivered prices at some destinations, figuring back therefrom to ascertain the applicable base prices and applying base prices to other destinations;

3. Making and keeping records of delivered prices and changes therein at destinations in its sales territory;

4. Policies and methods of quoting and sales for delivery to or by trucks;

5. Use of freight rates and freight rate compilations in quoting delivered prices;

6. Selling Government at f.o.b. destination cost with control clause and use of land-grant freight rates;

7. Diversion of shipments;

8. Picking up information through its salesmen and customers as to competitors' announced sales policies,

terms, and conditions of sale, and classes of trade sold direct or through dealers;

37676 9. Importance of the dealer trade to the manufacturer;

10. Desire of dealers for delivered price quotations and their approval of Respondents' selling policies;

11. Reporting and checking of contracts.

Mr. Leisure: If Your Honor please, I do not know exactly what the first part of Mr. MacIntyre's statement meant when he said it is stipulated and agreed. Certainly no such stipulation or agreement was ever entered into by us.

Mr. MacIntyre's statement on the record does violate all of our previous understandings that our discussions as to stipulations would be off the record, and since all of our statements and discussions have been off the record, I now move to strike his statement from the record.

Now, it is utterly impossible for us, as I have pointed out many times, to enter into a stipulation which would nullify any statement that we would produce from any future witnesses. The first reason is,—and I do not think I need to go further than one,—is that such a statement would not be true; to state that this company followed the same practices as to the control clause as the record already contains of other companies. The fact is, they do not use the control clause at all, and if we go down through these different things we can see the reason why

37677 it is impossible for us to simply adopt something that has gone into the record heretofore.

Now, we are wasting time, as far as I am concerned, in discussing that kind of a stipulation.

Trial Examiner Norwood: Now, if he does admit those things—I see he has that written out there. I would like to have it and study it. It may be that it will put off a great deal of this detailed evidence that Respondents insist on putting in here, although the record is very full and complete on all of it. If Counsel will give me a copy of that I will study it, and if he admits those things I am not going to permit you to prove them again.

37679 Mr. Leisure: If Your Honor please, I am not entirely clear about the word Mr. MacIntyre is using, "admission," exactly what he means by that. I suppose he means that proposed stipulation that he read a moment

ago, which he has asked us to agree to, and which I have said we were not able to agree to.

As far as our position is concerned, we are pro-
37680 ducing a witness before the Examiner to be heard.

We have offered a stipulation in order to shorten the hearing time, cut down his testimony; we have offered a stipulation which we are tendering to the Examiner and to the Counsel for the Commission in the hope that it may be accepted. If it is accepted, we can shorten the hearing time to that extent. Now, further than that, I do not want the record to show anything, as far as we are concerned, about agreeing to any admissions. In fact, I do not fully comprehend what the term "admission" means, as Mr. MacIntyre uses it.

Mr. MacIntyre: In reply to Mr. Leisure, I can say that the proposed stipulation as to what Mr. L. C. Letzkus would testify to is accepted by us pursuant to the terms of it as set forth.

It is hereby stipulated that if L. C. Letzkus, sales manager of the Cement Division of the Pittsburgh Plate Glass Company (hereinafter referred to as "Columbia," "Pittsburgh," or as the "Company"), were to testify on his direct examination with respect to those matters herein
after indicated, he would give as his testimony with
37681 respect to those matters the statements hereinafter set forth.

37682 I became associated with the Pittsburgh Plate Glass Company in 1925, and have remained associated with that company ever since. I have been sales manager of the Cement Division since January 1, 1925.

B. Organization of the Cement Division of the Pittsburgh Plate Glass Company.

The Pittsburgh Plate Glass Company is a Pennsylvania corporation, with its principal place of business at Pittsburgh, Pa. The company has cement sales offices at Pittsburgh.

Pittsburgh now owns and operates one cement producing mill. This mill is located at East Fultonham, near Zanesville, Ohio. It built this mill in 1924.

37683 The Pittsburgh plant is a modern, up-to-date economic plant. The plant is capable of producing about 1,875,000 barrels per year. It is a wet process mill. It secures its limestone from a quarry located at the plant site. The shale is secured from a bed which is on the plant

property. The fuel is obtained from Ohio mines located about 25 or 30 miles from the plant.

Pittsburgh has had the policy of keeping its mill up to date and it usually has some modernization work in progress all the time. Pittsburgh has attempted to make improvements so as to reduce costs and to improve the quality of its product. Among the improvements which have been made have been the installation of waste heat boilers, special unit pulverizers for each kiln, and air separators.

These and other improvements have been made at
37684 considerable cost but were necessary and advisable to maintain the mill as an up-to-date and economic mill.

Pittsburgh manufactures standard Portland cement, high early strength cement and waterproof cement.

To my knowledge, no cement manufacturer holds any stock in the Pittsburgh Plate Glass Company and Pittsburgh holds no stock in any cement manufacturing company. None of the officers or directors of Pittsburgh are officers or directors in any other cement manufacturing company.

The company is not affiliated in any way with any other cement manufacturing company and does not have any working agreements with any other cement manufacturing company by virtue of which one company supplies the orders placed with the other company.

Pittsburgh markets all of its cements under the brand name of Columbia.

C. Sales Territory:

The Pittsburgh Plate Glass Company normally solicits cement business and ships cement into Ohio, West Virginia, western Pennsylvania, northern Kentucky, and eastern Indiana. Occasional shipments are made beyond. We try to fill up our plant with orders for shipment to points adjacent to our plant.

In determining the area in which we will normally
37685 solicit business, we consider the following:

(1) The freight rate;

(2) The volume of business available in the territory adjacent to our mill;

(3) The mill net we would realize;

(4) The cost of securing the business;

(5) The volume of business available in a distant market.

(6) The service Pittsburgh is able to render in comparison with the service from competing companies, and

(7) The long-term or future relationship with purchasers in that market.

For this reason we are often ready to ship into territory outside of the area in which we solicit, but it is a territory in which it would not be profitable for us to exert any sales effort.

We do not set a minimum mill net figure below which we will not go in handling our sales. Each prospective order, when it comes in, is handled on its own merits. If the net is too low to suit us, under all the circumstances, it is not accepted. In determining whether an order will be accepted there are many factors to be taken into consideration, such as the customer requesting the shipment, the freight rate to the destination, the volume of business booked under other contracts, and the amount of shipments made by us during that shipping season. The 57686 element of the service which we are in a position to render tends to discourage distant shipments.

One of Pittsburgh's best markets is Pittsburgh, Pa., and others are Columbus, Cincinnati, and Akron. A very large proportion of the cement sales by the Cement Division are made to small dealer accounts which dealers are located in small towns.

At all of the large consuming points in the territory where it solicits business, Pittsburgh finds twelve or more competing companies actively engaged in soliciting and selling cement. At many of the points in Ohio and western Pennsylvania there are around twenty competing companies.

Pittsburgh sometimes follows a contractor out of its normal sales territory if the job is attractive and in order to maintain its connection with that contractor.

Generally speaking, Pittsburgh tries to keep its contacts with all the trade it has shipped for a number of years, in an effort to hold that trade and to maintain its position with those dealers and customers where it has built up good will as a result of time and money expended by the company.

Pittsburgh follows friendly contractors to points beyond its normal sales territory wherever it can get a satisfactory mill net, because the sales cost on such business is low and it continues a valuable contact with a rea- 57687 sonable certainty of obtaining the business.

We have never solicited business or made sales in the State of Mississippi.

The Pittsburgh Plate Glass Company comes into competition with all of the cement companies that are located in the State of Ohio and these are:

Diamond
Southwestern
Wabash
Standard
Medusa
Huron
Superior
Alpha, and
Lehigh.

We also find the following companies located outside the State of Ohio soliciting business in our marketing area:

Lone Star
Penn-Dixie
Kosmos
Universal Atlas
West Penn
Bessemer
Green Bag of Pennsylvania
Green Bag of West Virginia
37688 Allentown
North American
Standard Lime and Stone
Volunteer
Peerless, and
Wolverine

D. Method by which the Pittsburgh Plate Glass Company obtains information as to Competitors' Prices and Methods of Marketing:

The Cement Division of the Pittsburgh Plate Glass Company obtains its information concerning the published and unpublished cement prices of its competitors by means of information picked up in the field by its salesmen in the regular course of their calling on the trade. Its salesmen operate under instructions to transmit to the home office immediately any changes in the competitive practices or prices which they may find or hear of in the field. Pittsburgh has found that friendly dealers are willing to

turn over to our salesmen copies of price quotations received from our competitors. Its salesmen send to the home office all quotations of price changes or announcements of policy changes that they can pick up in the hands of customers. Pittsburgh also gets much information of competitive moves directly from such customers by way of telephone calls or letters. Another source of such information is tabulations of bids submitted to gov-
37689 ernmental agencies which are obtained by salesmen who attend the lettings, or from reports of the bids published by new service companies. As soon as I get any knowledge of a change in price by any of the ways listed above I telephone my salesmen and ask them to check the quoted prices and see what they find.

It does not take a very long time for Pittsburgh to get news of changes in competitive prices or policies. In most markets such information is obtained almost as soon as the competitive announcements are in the hands of the consuming trade. In all cases, the lapse of time is very short, and never more than a day, before Pittsburgh is fully apprised of competitive moves through the information which its salesmen are able to obtain in the field.

Pittsburgh has found building material dealers and contractors whose business it solicits, to be well-informed as to the delivered prices quoted on cement by itself and its competitors. It finds that purchasers compare the prices quoted by the various cement companies and keep in touch with the various sources of supply. It also finds that it is the practice of contractors to shop around to make sure that they obtain the lowest price quoted in any given market.

In the company's experience it has not found either a dealer or contractor willing to pay more for Columbia cement than for a competitor's brand.

37690 From the company's experience in selling cement, it has found that it cannot sell cement for more than its competitors and it has also found that it cannot permit any competitors to sell cement in any market at a price less than that quoted by Pittsburgh, or else Pittsburgh will be eliminated from that market.

In the event of a decline of price, Pittsburgh has found that its regular dealer and contractor customers ordinarily give it an opportunity to meet the lower prices quoted by competitors if Pittsburgh wishes to do so.

In the course of our daily operation, dealers normally telephone in their orders for cement. At the time the dealers make such orders there is usually no discussion of prices, except at the time of a price change. The dealer is invoiced at the last price we have quoted to him. If that price is higher than that quoted by any other company to that dealer, the dealer brings it to our attention and we meet the lower price to retain the dealer's business.

I have found that the dealers report to salesmen immediately information concerning price decline, at which time they usually request to have their recent orders protected and invoiced at the new low price. We have generally followed this procedure on shipments made five days before the decline.

I have also found that in the event of a price advance,
the dealers immediately bring that to the attention
37691 of our salesmen in an effort to find out whether
or not they have to protect themselves on future
shipments of our brand of cement. At the time of calling an increase made by one company to the attention of our salesmen, dealers usually request information as to whether or not we intend to follow along with the price increase. They also request information as to whether or not we will protect them on certain specific jobs which they have sold to contractors or others.

In the event of a change in price Pittsburgh generally learns of the change in price at all of the important markets where a change was made. All out-of-town telephone calls and telegrams about price changes and placing of orders are generally made with the charges collect.

E. Method of Analyzing Delivered Prices:

Upon receiving the first information about either a new quotation above or below the market, we advise our salesmen to check all the delivered prices quoted at the various destination points in their territory. Our salesmen check the prices quoted by each of our competitors in an attempt to confirm either the old price or to ascertain what changes have been made at all of the important points where Columbia cement is consumed, and we always contact the dealers who consume large amounts of our cement. This information is then telephoned and forwarded to the home office where we take the various quotations we have received, and we compare the delivered prices which
37692 have been quoted.

During the time that I have been with the Pitts-

burgh Plate Glass Company, the comparison of the delivered prices has, on several instances, shown that a flat price for cement sales was quoted at most of the points in some territory such as Allegheny County, Hamilton County, Cuyahoga County, or the State of Ohio, and we assumed that this price existed for the entire areas, until we found information to the contrary. At other times the delivered prices appear to form a pattern around some mill, or other shipping point, the delivered prices varying in accordance with the amount of the freight rate from that mill to the various destinations. We then carefully check to ascertain whether or not there is a uniform net at this company's mill or silo for any given territory, and if there is we assume, until we find delivered prices reflecting some other condition, that the competitor intends to limit himself to that net—sometimes called a base or price base or so-called base price—on all of his business.

With that information as to the mill net or base, we attempt to anticipate the delivered prices which that company will quote at other points and we issue quotations either meeting the change or restating our own prices.

Upon issuing quotations to points at which we have no specific information as to what prices are quoted, we have no assurance that our price will meet the price 37693 quoted by the company initiating the price change.

We are sure, however, that if our quotations were higher than our competitors, our dealers would inform us, and if our quotations were lower than any of our competitors they would be forced to meet our low quotations. In addition, if our quotations were lower or higher, our salesman would probably be advised of this fact on his calling upon the trade.

When we broadcast quotations, we send them to all our cement dealers and prospective cement dealers, but we do not send them to any of our competitors. We also do not receive quotations mailed direct to us from competitors.

F. Basis upon which Pittsburgh quotes its prices:

It is the usual practice of the Pittsburgh Plate Glass Company to quote destination prices. This has been the practice as long as I have been connected with the company. It has also been the practice to meet the lowest delivered prices which we found quoted in any market in which we wish to sell.

Pittsburgh is merely a price follower. In some instances we have sent out quotations at prices which were not the same as the lowest quoted price in the market, but, in general, we have met the destination prices as we have found them.

In arriving at its delivered prices for the various destinations where it sells cement Pittsburgh recog-
37694 nizes that the market price at many points usually reflects some base or basing point. Pittsburgh, however, quotes the lowest quoted price at each point where it sells cement regardless of whether or not the delivered price appears to reflect a base.

The E. Fultonham mill is a so-called "non-base mill." Pittsburgh is free to make its mill a base mill at any time, if it should decide that it was advisable.

The mill in East Fultonham, Ohio, appeared at one time to be a base mill. The basis of my conclusion is that during 1931 and 1932 we found in the field delivered prices which could be figured back in the area surrounding our mill to a constant figure at our mill. I do not know which company originated this situation but I believe that the first quotations which we found were issued by the Alpha Portland Cement Company located at Ironton, Ohio. Having checked the delivered prices at various points in the area surrounding our mill and determining that these delivered prices were at a figure below the delivered prices being quoted by our company, I decided to meet those delivered prices, regardless of the manner in which they were figured. This situation continued for a time and I believe was discontinued late in 1932, at which time we found quotations in the field advancing the delivered price, none of which could be figured back to any constant net at our mill. We met this increase in price and after that time no constant figure or so-called base has ever existed at our mill.

37695 G. History of prices in our marketing area:

The major changes in price which have affected the territory in which we have marketed cement from July, 1932, through July, 1938, are as follows:

1. On August 11, 1932, our salesmen found in the field quotations of the Huron Company dated August 10th which increased the delivered prices in Northern Ohio. An examination of these quotations indicated that after deduc-

tion of freight rate and package charges there was an increase to $1.20 in the mill nets or so-called bases at Toledo and Cleveland, Ohio. The previous uniform mill nets were 95 cents at Cleveland and $1.10 at Toledo. These quotations also showed a reduction in the bulk differential over cloth sacks from 50 cents to 45 cents per barrel. On the days after that we found quotations of other companies following Huron's prices. Subsequent to receiving this information, on August 18, 1932, we mailed quotations to our trade following this increase in delivered prices.

2. On October 1, 1932, our salesmen found in the field competitive quotations of Medusa dated and effective September 30, 1932, which reduced the delivered price at many Ohio points. After deduction of freight rates these quotations appeared to reflect the establishment of Fultonham and Osborn as bases at $1.06 and a reduction at Cleveland and Toledo to $1. We immediately met the reduc-
37696 tion in delivered prices which we found. Delivered prices at Cincinnati were reduced but could not be figured back to any base.

3. On December 9, 1932, our salesmen reported delivered price quotations by Alpha dated December 8th, effective December 13, 1932, advancing delivered prices in Ohio. After deducting freight rates these quotations indicated that there was an increase of 20 cents in the Toledo and Cleveland bases to $1.20; an increase of 19 cents in the Universal base to $1.40 and an increase of 29 cents at the Ironton base to $1.35. None of these quotations indicated that destinations were figured on either Fultonham or Osborn as bases. On December 12, 1932, we issued quotations following this advance.

4. On March 20, 1933, our salesmen found in the field an announcement of Lone Star and their quotations dated March 20 and effective March 25 increasing delivered prices at some Indiana and Ohio points. These quotations indicated an advance of 10 cents to $1.45 in the maximum mill net or base at the Limedale mill. We issued quotations on March 23, 1933, increasing our prices at the points affected.

5. On April 10, 1933, our salesmen found in the field an announcement from Lone Star with their quotations effective April 8 reducing their delivered prices to the level prior to March 25, 1933. We issued quotations meeting these reductions. We did not sell any cement at the

increased prices announced by us during the time
37697 our quotations were in the hands of our dealer
trade. Our increased prices were not met by all our competitors.

6. On June 30, 1933, our salesmen found in the field competitive quotations of Superior, dated from June 29 and effective on July 7, which reflected an increase of delivered prices of 25 cents at most of the points in our marketing area. From July 2 to July 6 we found quotations from other companies meeting these increased prices. Immediately prior to July 7, I issued instructions to the effect that we would follow along with this increase in delivered prices.

7. On September 29, 1933, our salesmen found in the field competitive quotations of the Wabash Company, reducing the prices, effective September 28th. An examination revealed the fact that the new prices had been reduced by the amount of the emergency freight charges which were to expire on September 20. We met this decrease in delivered prices.

8. On April 1, 1935, our salesmen found in the field competitive quotations which after examination indicated that prices had been increased by the amount of emergency increases in freight rates.

9. On September 3, 1935, our salesmen found in the field quotations by the Lehigh Company, dated and effective on September 3d, which after deduction of freight rate and package charges indicated that the uniform mill net at Cleveland had been reduced 15 cents to $1.50 and
Ironton was reduced 10 cents to $1.60. On Septem-
37698 ber 4, we found quotations which appeared to reflect a base at Toledo of $1.50. We met the reductions in delivered prices immediately.

10. On January 2, 1936, our salesmen were told by dealers that a competing cement salesman had told them the price would be increased.

11. On January 3, 1936, and thereafter, our salesmen found in the field competitive quotations dated and effective January 7 and January 8, which after deduction of freight rate and package charges indicated an increase in delivered prices in Northern Ohio which could be figured back to $1.65 at Cleveland. On January 4th or 5th we mailed quotations following the increased prices wherever we found them.

12. Early in January, 1937, our salesmen found quotations in the field reducing the delivered prices. An examination indicated that the delivered prices appeared to have been reduced by the amount of the rate reductions caused by the expiration of the emergency freight charges.

13. On March 15, 1937, our salesmen found in the field competitive quotations by the Alpha Company dated March 15, effective March 20th, which after the deduction of freight and package charges indicated an advance at Ironton of from $1.50 to $1.60 per barrel in Alpha's base figure. Upon finding that other companies had issued similar quotations, we mailed quotations following along in this price advance.

37699 14. On March 15, 1937, our salesmen picked up quotations in the Pittsburgh Metropolitan area reducing delivered prices. We met those delivered prices. The Alleghany County prices were all one figure and none of the prices appeared to reflect any base plus freight.

15. On September 27, 1937, our salesmen found in the field competitive quotations dated and effective September 27th which reduced the delivered prices at many points in Northern Ohio. After deduction of the freight rate and package charges, these delivered quotations indicated that the base at Cleveland had been reduced from $1.65 to $1.50. We met the reduced delivered prices we found.

16. On November 11, 1937, our salesmen found in the field competitive quotations from Universal Atlas dated November 10, and effective November 15, 1937, which indicated that an increase in delivered price had been made equal to the amount of an emergency increase in freight rates which rate became effective on November 15. We followed this increase, but continued to solicit at the previous prices until November 22, when the last company in our market area followed the advanced prices.

17. On April 20, 1938, we mailed quotations to our trade increasing our delivered prices at many points by an amount equal to the increase in freight rate. No sales were made on our quotations until around May 28,

37700 1938, when the last company in the territory where we sell followed this increase.

18. In October, 1938, our salesmen reported from the field that they found cement was being sold in Hamilton County at a price below the lowest quoted price. I instructed our salesmen to meet this competition but we did not issue quotations to that effect.

H. F.o.b. Mill v. F.o.b. Destination Prices:

It has been the usual practice of the Pittsburgh Plate Glass Company to quote and sell its cement for delivery f.o.b. destination. The reason that Pittsburgh now follows that practice is that we are usually asked to quote a delivered price, and our experience has been that the purchaser is interested in the price at the point where the cement is to be used and is not concerned with a price at our mill. I have always found that the competition we had to meet was at the point of use.

Pittsburgh quotes delivered prices to enable it to compete with other manufacturers and to enable its dealer and contractor customers to compare its quoted prices with the prices or delivered costs quoted by its competitors.

I recall very few requests by our dealers or contractors for prices f.o.b. mill as these are only when a customer wants to truck the cement. Dealers and contractors almost invariably request prices f.o.b. destination.

37701 Although in a few instances Pittsburgh has received requests from departments of the Federal Government for bids f.o.b. mill, the Federal and State governmental departments usually request Pittsburgh to bid on an f.o.b. destination basis.

Pittsburgh has no policy against making sales f.o.b. mill and would consider making sales f.o.b. mill to any purchaser under satisfactory circumstances. Pittsburgh did make one or two f.o.b. mill bids to the State of Indiana but awards were made to it only on a delivered price basis.

I. Quotations of Price by Salesmen:

Each salesman is empowered to quote prices, but these prices are subject to confirmation by the home office. Each Pittsburgh salesman generally knows the company's price at all destinations in his territory, and he quotes that price to customers there. If he finds competitors' prices different from those he is quoting at some of these points, he consults the home office. In the event of a change in price, Pittsburgh receives information and collects quotations concerning the new announced price or prices, at all of the important destinations at which it sells cement, and then informs its salesmen as to its new delivered prices. Our salesmen ordinarily do not have any occasion to compute or calculate delivered prices at the major points of cement consumption within their territories, since informa-
37702 tion as to the lowest quoted delivered prices becomes

a part of their general information resulting from day-to-day solicitation of the trade.

J. Practice of Bidding to the Government at Regular Commercial Price:

On all governmental work, both federal and State, Pittsburgh usually bids its regular commercial price at any particular destination. On a few occasions Pittsburgh has bid lower. The reason for this practice is that Pittsburgh has never felt that the Government is entitled to any lower price than its regular trade, and that it believes that a lower price to the Government would react unfavorably with Pittsburgh's customers. One of Pittsburgh's reasons for not giving a special price to the Government on any particular letting, is that Pittsburgh believes that its customers would seek similar price considerations. Pittsburgh respects the views of its dealer and contractor customers because it has to rely on their regular business. Government business is spotty and never results in what can be called "having a customer"—that is, a regular year in and year-out customer.

In filling out an invitation to bid to the State or federal agency we look at our destination price file and insert in the bid blank the price which is shown on our price cards. During the N. R. A. Code period, we bid the lowest price which we found on file with the Code Authority.

37703 K. Effect of Reducing Prices:

During my experience in the cement industry, I have observed a great number of reductions in delivered prices at points where the Pittsburgh Plate Glass Company markets cement. Whenever we met such reductions in price we have found that our volume of business in such markets has not been increased, and that such reductions have usually resulted in our customers and prospective customers reducing the amounts of their purchases. I have observed in the case of price declines that practically all of the companies competing with Pittsburgh have met the reduction in prices in the affected markets within a few hours and that Pittsburgh has neither increased the amount of its orders in such markets nor increased the proportion of sales it makes to the total amount of going business at such markets. In the case of those price reductions experienced by the Pittsburgh Company, I have not found that the company initiating the price reduction has

been able to take any substantial amount of business away from the Pittsburgh Plate Glass Company whenever we have met the lower prices. It has been the usual practice of Pittsburgh to meet such lower prices, and Pittsburgh has found that it could not sell cement at the old and higher prices.

From time to time I have also observed increases in delivered prices in territory where Pittsburgh markets cement and I have found that when an increase in
37704 prices is announced by one company and followed by other companies that our customers in such markets have usually increased the volume of their purchases. Such purchases are made at the low prices existing before new and increased prices become effective.

L. Deviations from published prices:

Pittsburgh normally sells at its openly quoted price. From time to time, it has found that it was impossible to make sales to a friendly contractor or dealer at
37705 Pittsburgh's openly quoted price. In such cases there had been nothing in its previous relations that would account for his not doing business with Pittsburgh. Pittsburgh has been considered making reductions or deviations from its openly quoted price, and in some instances has made such deviations. The reasons for considering such deviations and in some instances making them, has been the fact that Pittsburgh believed that a competitor had offered to this friendly dealer or contractor a price lower than Pittsburgh's quoted price or lower than any other openly quoted price.

In the regular course of their work, our salesmen are instructed to report to me any evidence which they may find of the existence of secret concessions in price or terms and conditions of sale. Reports are brought to my attention at the time and we make every effort to check in so far as possible as to the accuracy of such reports. In my experience I have found that a number of our competitors have granted deviations in price by selling a commodity or other material at cost in connection with the sale of cement at that company's quoted market price or allowing special favors to the contractor, such as supplying dirt for fills on a road job or making available a place for a contractor to dump his excess dirt and other similar favors to the contractor.

I have also had friendly contractors offer to buy from me in the event that I offered them as favorable
37706 a price as they were able to receive from competitors and have been unable to make a sale to them either at the market price or at a price below the market price. I understand this to be an indication that they had secured even lower prices from one of my competitors.

I have also found from time to time that dealers have bid to State or Federal Government prices equal to or below the lowest quoted market price of the cement manufacturer on whose brand of cement the bid was submitted.

On jobs involving substantial quantities of cement in all my cement experience, special prices or terms have frequently been available to the user of large quantities of cement. These prices were at figures less than the lowest published market prices or with more favorable terms. Pittsburgh prefers to sell at its quoted price at any given point, but on occasion it has met secret prices when it has been necessary to maintain its position in the market, and has made special prices in an effort to anticipate its competitors quoting secret prices. Friendly dealers and contractors of the Pittsburgh Company tell our salesmen or tell me in the event that they have been offered a special concession from one of our competitors, and have given us the opportunity to meet such concessions. From time to time, Pittsburgh has made price concessions to contractors on large orders in an endeavor to meet the competitive situation which it found in connection with
37707 that particular job.

M. Importance of the Dealer in the Marketing of Cement:

The dealer is Pittsburgh's most important customer. The percentage of business that Pittsburgh sells through its dealers is around 65 percent. The importance of the dealer has had a tremendous influence on Pittsburgh's marketing methods and policies. Pittsburgh is confronted with a constant necessity for preserving dealer outlets, for fostering the dealer's good will, and giving him a price and terms that will enable him to compete with other dealers selling in the same consuming area.

N. Pittsburgh's Concept of a Dealer:

The Pittsburgh Plate Glass Company requires its dealers to be persons with whom the purchasing public trades

in buying cement and other building materials. Before deciding whether it will sell someone as a dealer, Pittsburgh tries to ascertain whether in its judgment he carries on hand a stock of building materials commensurate with the requirements of the locality where he is located, whether he is equipped to give service in the distribution of our product, and whether or not he has a good credit standing. Pittsburgh has made it a practice to investigate prospective dealers carefully to see whether or not they are in a position to assist in the marketing of Pittsburgh cement.

37708 The question of whether we will sell a given dealer varies depending upon whether or not Pittsburgh has adequate dealer representation in a given market and upon the size and needs of each market.

We have sold and do continue to sell as dealers, persons whom many of our competitors do not sell as "dealers."

Our concept of a dealer has been in effect since I have been with the company.

O. Business Sold Direct or Sold Through Dealers:

Pittsburgh sells through dealers only when sales through established dealer channels seem fair and logical, and where dealers render a service to the ultimate consumer. Pittsburgh also sells direct to contractors, ready-mix plants, concrete products plants and to the State and Federal Governments.

Article XI of the N.R.A. Code made no substantial change in the marketing practices of the Columbia Cement Division of the Pittsburgh Plate Glass Company. After Article XI was suspended, Pittsburgh continued to sell on substantially the same basis as before.

In February and April, 1935, statements of policy on this subject were issued. We did not make these announcements pursuant to any agreement with dealers, or dealer organizations, or with competitors.

P. Terms of Sale and Discount:

37709 I have always made my terms at least as favorable as any granted by my competitors because I could not compete as long as I was offering terms which were less advantageous than those offered by other manufacturers. From experience I have found that whenever one of my competitors started giving terms which were

more favorable than mine that I had to adopt the change and my reason for not granting more liberal terms myself is that I know from past experience that it would not be more than 24 hours before my competitors quoted terms as favorable as mine or even more favorable.

Q. Broadcasting Quotations:

Since 1925, the Pittsburgh Plate Glass Company has issued quotations to the dealer trade to whom we sell or from whom we solicit business whenever there is a change in price or in terms or conditions of sale. In addition, there have been occasions when we have issued quotations when there is no change in price. This is done in order to keep our brand before dealers whom we do not regularly sell.

In the event of a reduction in price which we decide we will meet at a given destination, we normally authorize our salesmen to meet this reduction prior to a dealer's receipt of our quotation. Under such circumstances we confirm the prices quoted by our salesmen by means of a letter.

R. Freight Rate Information:

Salesmen of the Pittsburgh Plate Glass Company are not given copies of The Cement Institute freight rate book.

37710 S. Statistics:

The Pittsburgh Plate Glass Company has received copies of statistical reports sent out by The Cement Institute. This information consisted of a monthly statement of production of clinker and cement and cement shipments during the previous month with stocks on hand at the end of that month. This information was distributed to us by The Cement Institute without any comment. None of this statistical information had any reference whatsoever to price or any elements of price.

I looked over this statistical information to see whether anything contained in it might be of interest to us. Generally speaking, I used it merely as a means of keeping posted on matters of general information. I also received Government reports made by the United States Bureau of Mines which covered substantially the same ground, but which were received at a considerably later time.

37717 L. C. LETZKUS, called as a witness on behalf of the Respondents, being first duly sworn, testified as follows:

Direct Examination by Mr. Withrow.

I went with Universal in 1909 and remained there until I went with the Pittsburgh Plate Glass Company on January 1, 1925. I have charge of sales and marketing policies at the Pittsburgh Plate Glass Company and report direct to the president of the company. He takes an active part in the management of the Cement Division only in a general way. He leaves most of that to me, fixing the policies and the prices at which we are going to sell our product. If anything unusual comes up that I want advice on, I go to him. One of the vice presidents of the company has charge of the operating end. That was Mr. H. A. Galt, up until April 1, and he retired and is now succeeded by a
37718 new vice president, Mr. Asplundh. I do not know his initials at the moment.

Q. Is the Pittsburgh, or is the Cement Division, a member of the Cement Institute?

A. Yes, sir.

37719 The witness identified Resp. Ex. 2840 as an application for membership in The Cement Institute written by him.

37720 (RESP. EX. 2840 was offered and received in evidence.)

37721 Trial Examiner Norwood: Before you joined, did you know anything about its service, or did you receive its service?

The Witness: In a general way, yes.

By Mr. Withrow:

Q. That is, you knew about it?

A. We knew about it, but we were not, as I recall, getting any of their statistics, or anything of that sort. I may have, probably had, a sample of what they sent out, or something of that kind, but we were not entitled to it, and not paying any dues; we were not a member.

Q. Now, are you still a member of the Institute?

A. Yes, sir.

37722 The witness identified Resp. Ex. 2481-A as a memorandum dictated by him; Resp. Ex. 2841-B as a copy of a letter he wrote to The Cement Institute.

37723 (RESP. EX. 2841-A and 2841-B was offered and received in evidence.)

By Mr. Withrow:

Q. Mr. Letzkus, in the minutes of the meeting held January 24, 1930, there is a statement to the effect that the question of Pittsburgh Plate Glass Company becoming a member of the Institute has been submitted to all the members. Did you become a member of the Institute January, 1930?

A. No, sir; we did not.

Q. And will you tell us, were you approached about becoming a member about that time?

A. Yes, and we probably would have joined then if the greater percentage or all of the cement companies had gone in, but we did not propose to go in and pay dues, with a lot of other companies not in supporting the thing with their dues, so we withheld our membership until all these companies would go into it, help support it.

Q. Well, I direct your attention to a letter purported to be written by you, Commission's Exhibit 139-M, and ask you if the statement you just made was what you intended to imply by that letter?

37724 The Witness: Well, it confirms what I said before that.

37725 Q. Mr. Letzkus, would you look at that Commission's Exhibit 139-M, and tell us what you meant by the letter?

37726 A. Well, the whole story is just this, that we were invited to join the Institute, that we were not willing to go in unless they had a very substantial representation among the different cement companies. Now, there were not—there were several companies that were not in it, and we did not propose to go in and pay our dues until these other fellows got in there and paid theirs. In other words, we were not going to pay money to carry the thing along unless these other fellows were willing to do their part.

Now, that is about the gist of the whole thing.

Trial Examiner Norwood: Let me see it after you get through. Are you through?

The Witness: Yes, sir (handing the document to the Trial Examiner).

37727 Q. Well, I will show you Commission's Exhibit 136-3-K, and ask you if this refreshes your recollection in any way?

Mr. MacIntyre: Will you read the question, Mr. Reporter, please?

(Question read.)

The Witness: Shall I answer now?

Trial Examiner Norwood: Yes.

37728 A. Well, it does not refresh my mind very much, except that I see that my name is here on this list as having been at this meeting, so I guess I was there; but I do not recall anything about the meeting, or what was said, or who was there.

By Mr. Withrow:

Q. Did you, to your knowledge, attend any meetings after that meeting of May 12, 1931, until the time you joined in June, 1933, to your recollection?

A. I do not recollect whether I did or not. I doubt it very much.

Q. Now, there is some evidence in the record, Mr. Letzkus, to the effect that at one of these meetings in 1930 there was an agreement to curtail production to 70 percent of the mill's rated capacity. Did you enter into any such agreement?

A. No, sir.

Q. At any meeting at that time?

A. No, sir.

The witness identified Resp. Ex. 2842 A as his let-
37729 ter to Mr. Mallory; Resp. Ex. 2842 B as appearing to be a reply to his letter.

(RESP. EX. 2842-A and 2842-B was offered and received in evidence.)

By Mr. Withrow:

Q. Mr. Letzkus, have you ever been an officer of The Cement Institute?

A. No, sir.

Q. Have you ever been a trustee?

37730 A. No, sir.

Q. Have you ever served on any Institute committee?

A. No, sir.

Q. Did you ever have any official connection with the Code Authority for the cement industry?

A. No, sir.

Q. The N. R. A. Code Authority?

A. No, sir.

Q. Did you ever enter into any agreements on price or marketing policies at an Institute meeting?

A. No, sir.

The witness identified Resp. Ex. 2843 as a letter he received from The Cement Institute in connection with the discontinuance of the Chicago division dues and a slight reduction in general dues.

37731 Q. And were any of the services which you received discontinued about that time?

A. That is in 1936, wasn't it?

Q. September, 1936.

A. Well, there was. Yes, I guess that is when they stopped reporting contracts, giving us contract information. I think that was along in about that time.

Mr. Withrow: Your Honor, I offer in evidence Respondents' Exhibit 2843, for identification (handing the document to Mr. MacIntyre).

37734 Trial Examiner Norwood: On the record.

Now, this is some action taken on September 19, 1936, to reduce the membership dues of the Institute; is that right?

The Witness: That is right.

Trial Examiner Norwood: And these reductions were actually made, were they?

The Witness: Yes.

Trial Examiner Norwood: And you can tell us how much it cost you after that?

The Witness: Yes.

Trial Examiner Norwood: October 9, 1936?

The Witness: Well, that is 1936, and that went on for—I don't know for how long—and until this case came up. How long has this case been going on, about three years, two and one-half years?

Trial Examiner Norwood: Yes.

The Witness: The dues were higher then naturally to help take care of the expenses, so we are paying the higher dues from that time on. Now, in return for those dues

then, and what we are paying now, we get certain
37738 statistics that are worth something to us, and then in addition we are obligated, more or less to stand our part of the expenses in this case.

Trial Examiner Norwood: Well, leave that out.

The Witness: My object was just merely to explain why we are still in it, and why we are paying the money. That is what we get for it.

Trial Examiner Norwood: The objection is overruled. It may be received as marked.

(RESP. EX. 2843 was offered and received in evidence.)

37739 By Mr. Withrow:

Q. Mr. Letzkus, I show you Commission's Exhibit 1006, and ask you if you recall receiving that letter?

A. Yes, I think I recall this after it has been refreshed in my mind.

Q. Well, would you tell us under what circumstances or what were the circumstances at the time that you
37740 received that letter?

A. Well, I cannot recall now what the circumstances were. It is too far back for me. It has to do with trucking conditions up in Lucas and Cuyahoga County.

Q. Well, that refers to an inquiry by you. Do you recall having made any inquiry to which that was a reply?

A. No, I do not. You can refresh my memory on it in any way if you have any papers there.

Q. Mr. Letzkus, did you ever—would you tell us whether or not you ever complained to a Code Authority that the prices filed by any of your competitors were not in form which gave you a chance to meet the prices they quoted?

A. Do you mean on trucking?

Q. Yes.

A. It is quite likely that I may have done that, particularly up in Cuyahoga and Lucas County areas.

Q. With that in mind, does that refresh your recollection about Commission's Exhibit 1006-A?

A. Oh, I cannot recall the details of the thing, except I know that I did not like the idea of competitors trucking in those counties, because it kept us out of the territory. It was a hardship on us, and we could not meet those conditions very well from our plant on account of the location.

Now, I do not recall now just what the detailed com-

plaint might have been, but I do know that I was
37741 did not want to see trucking in those counties for the simple reason that it took business away from us, and we could not properly meet that competition.

Q. Well, was your inquiry directed to find out what the trucking conditions were in Lucas and Cuyahoga Counties?

A. Quite likely, because it was difficult to know just what they were charging, what the competition was, and what we had to meet.

Q. Now, Mr. Letzkus, has the Pittsburgh Plate Glass Company ever looked to The Cement Institute as the formulator or arbiter of marketing policies?

A. Oh, no, never.

Q. Has The Cement Institute ever dictated to you the prices which you had to quote or solicit business at?

A. No, sir; never.

Q. Has The Cement Institute ever interfered in any way with the pricing or marketing policies which you wanted to follow?

A. No, sir.

Q. On the discontinuance of the N. R. A. Code for The Cement Institute, after the Schechter decision, did you make any changes in your sales and marketing policies?

A. No. I think we continued on just about the same.

37742 The witness identified Resp. Ex. 2858 A to F as a photostat of the covering page and the first five pages of Pittsburgh's freight rate book. This book is prepared by the company's own traffic department from railroad papers or tariffs. They make up those books for "our" department. The traffic department of Pittsburgh Plate Glass Company is not part of the Cement Division and has nothing to do with it. It is the traffic department in the Pittsburgh general office. It looks after traffic affairs for the entire company including the Cement Division.

Mr. Withrow: Your Honor, I offer in evidence at this time Respondents' Exhibit 2858-A to F. I have here the complete freight rate book, but I see no purpose to offer it. I have taken the fly leaf and the first five pages. Counsel for the Commission is free to offer the rest, if
37743 they so desire (handing the exhibit to Mr. MacIntyre).

Trial Examiner Norwood: You use that book instead of the Institute freight rate book?

The Witness: Yes, sir.

Trial Examiner Norwood: You do not use the Institute rate book for any purpose?

The Witness: No, sir.

Examination on Voir Dire by Mr. MacIntyre.

Q. Mr. Letzkus, with respect to information that appears on this exhibit, outside of the first column, do you use any of that for shipping purposes, or is it used by your company for shipping purposes?

A. I do not understand just what you mean, Mr. MacIntyre. Do you mean these bases or figures here, or whatever you call them?

Mr. MacIntyre: Please read the question to the witness, Mr. Reporter.

(Question read.)

A. Well, I do not know just what you mean, Mr. MacIntyre.

By Mr. MacIntyre:

Q. Well, for what purpose does your company 37744 use that information that I refer to?

A. Well, it is very interesting to know at all times what freight rates are from other mills. It keeps us posted generally on some of these so-called base mills, the way we figure our price, and to know what sort of mill nets our competitors are getting. It is general information, but we do not use it, or have to use it in connection with our shipments whatever.

Q. You do not use it in connection with your shipments?

A. No, if I understand what you meant by your question. Do you mean does this have anything to do with the price that we quote on cement? Is that what you are getting at?

Q. No; as to whether it has anything to do with the rates you use in determining transportation costs, in shipping your cement?

A. Well, may I go into this a little bit, Your Honor?

Trial Examiner Norwood: Yes.

The Witness: Well, I imagine it has to do with prices being quoted, because I have heard that—that has been up so frequently here, and I think it has been explained that

we want to get all the money we can for our cement. We do not expect to be able to sell it higher than the other fellow.

Trial Examiner Norwood: Well, you simply answer with respect to your use of that book. You need not go into those explanations there. We have already
37745 heard them many times.

The Witness: Well, I do not know how else to answer it.

Trial Examiner Norwood: Do you use it for shipping? Do you use it for pricing, or both?

The Witness: We know the prices, having gathered them out in the territory, and using a formula we find that that price that we have been using out there, and which we picked up in the field, goes back to some certain cement companies, perhaps, and shows a mill net; in fact, it will to every one of the companies in the area for which we have these freight rates.

Trial Examiner Norwood: Then, you use it for figuring prices, do you?

The Witness: Not exactly in that sense. We have our prices on a card file.

Trial Examiner Norwood: Do you use it in connection with pricing?

The Witness: Well, I suppose you would call it, yes. I, naturally, if I am going to figure price, I want to see what the other fellows are going to get at their plant, if I can.

Trial Examiner Norwood: Well, you need not go into that explanation, because we know about that.

The Witness: That is what I thought.

37746 Trial Examiner Norwood: We have heard it a great many times.

The Witness: Does that give you what you want?

By Mr. MacIntyre:

Q. Well, I think I understand, you say that you use that information in connection with your pricing and not in connection with your shipping; is that what you meant to say?

A. We would be able to go ahead and quote prices without any of that information.

Q. Well, I know; you do use it, however, I understood you to say, in connection with your pricing, but not in connection with shipping.

A. Yes.
Q. Is that correct?
A. That is true.
Q. Now, will you tell me, Mr. Letzkus, referring to the second sheet, and the first figure, the first column on that sheet 44, that is in the term of cents per barrel, isn't it?
A. Yes, sir.
Q. And did we understand you to say that the traffic department of the Pittsburgh Plate Glass Company secured that figure from an official tariff of the railroad?
A. No, I do not think you did. I did not say that they received this figure, Mr. MacIntyre, because they get it in hundredweight, and they convert it for our con-
37747 venience into barrels.
Q. And in what manner do they convert it?
A. Well, they have a hundredweight figure, and I suppose they multiply it by the weight of a barrel, 380 pounds, and that would give it to us. Now, say, for instance, you had a hundredweight figure in the tariff of 14 cents a hundredweight, 380 pounds to a barrel, that would figure out about 53 cents a barrel.
Q. Well, can you use your 3.8 and your multiplication there in the hundredweight rate; what do you do when you get a fraction over, that carries no fraction?
A. If it is less than half a cent, we generally drop it. If it is more than a half, we add it.
Q. Carry it up to the next full cent?
A. Yes.
Q. You could not use any of that, then, for that shipping purposes, would you? You would have incorrect freight rates?
A. We did have to go into detail on Government shipments. Well, that was not on the freight rate, though; I guess that was on weights, right down to a quarter of a pound in a 400-barrel car, bulk cement, and we had to figure it right down to the quarter pound in making up the invoices in that case.
Q. Do you know whether the appropriate freight rates shown in this exhibit differ from alleged freight rates that are shown from the points indicated to the points in-
37748 dicated in the Ohio freight rate book of The Cement Institute as of that date?
37749 A. No, I do not know, because I did not have the Institute books. I never compared them. We de-

pend entirely upon our own traffic department to get this information for us, and use it is they give it to us.

Trial Examiner Norwood: Does the traffic department check up that book with the Institute book?

The Witness: Oh, I do not think so, Your Honor. My understanding is that they do not.

Trial Examiner Norwood: Do you know anything about it? Do you know?

The Witness: No. I do not know the details of their working. We have a very large traffic department, and it would not surprise me if they have, knowing about these books, I would not be a bit surprised, but what they had one of them to see what it looks like, but my understanding is they get it right out of the railroad tariffs.

By Mr. MacIntyre:

Q. You don't want your testimony to be taken here, though, that they do not check with the Institute books in making up your books such as is shown by Respondents' Exhibit, for identification, 2858?

A. Well, I think it would be unfair, would it not, for me to say that they do not check, because I do not know whether they do or whether they don't; never having compared the two.

37750 Q. Now, coming to one other question, Mr. Letzkus, I refer you to this page marked Respondents' exhibit, for identification, 2858-E. I see opposite the town of Augusta a freight rate of 36 cents, with reference to a footnote, where a note appears "Rate via PRR 42." Can you explain that to us?

A. Well, only in this way. As a matter of fact, I never questioned that. I assume that this rate that our traffic department gives me here, 36 cents, is absolutely correct, and that evidently is by some particular route. Sometimes you run into those things where there is a difference by two different railroads.

37751 (RESP. EX. 2858-A to 2858-F was offered and received in evidence.)

Direct Examination by Mr. Withrow (Continued).

Q. Mr. Letzkus, I think there was some misunderstanding between you and Mr. MacIntyre of the word "check." Have you ever checked the Institute rate book against your own rate book, which was just received in evidence?

A. No, sir.

Q. Now, do you know whether or not it is the practice of your traffic department to check the Institute rate book against the rates which they prepare?

A. I do not know. I cannot tell you. Now, should I go into a little further explanation on it?

Q. Well, yes. Would you tell us?

A. Except to say this, that they know of the Institute books, they may have some of them in their depart-
37752 ment now, just as a matter of opinion, to see how they are gotten up, and what they put in it, and stuff of that sort, but so far as making up our books, it is my understanding that they get them from the railroad tariffs.

Q. When you want a rate which is not contained in those rate books, what do you do?

A. I call up our traffic department and tell them we want a rate to such and such a point. In due course they get it for us.

Q. There is a lot of testimony in this record about so-called base mills. Mr. Letzkus, would you look at Respondents' Exhibit 2858-B, and tell us, if you know, whether or not you consider on March 15, the effective date of this book, Osborn to be a base mill?

A. No, sir.

Q. How about Painesville?

A. No, sir.

Q. Is that what "Pny" stands for?

A. I think so.

Q. And "BB," what does that stand for?

A. That is Bay Bridge.

Q. Was that a base mill?

A. I do not believe it was at that time, back in 1937. I think it is now. I think they have a base up there.

Q. And how about—was your mill at Fultondigm
37753 a so-called base?

A. In 1937?

Q. March, 1937.

A. No, sir.

Q. So that you had rate information from other than so-called base mills?

A. Had what?

Q. That you had rate information from other than so-called base mills.

A. Oh, yes. We have it from all the mills, I guess, in the area in which we ship.

Q. Now, is there any agreement between you and your competitors about converting rates from cents per hundredweight to cents per barrel?

A. No, sir.

Q. Can you recall how far back in your experience this practice of dropping everything below half a cent, and increasing to the next full cent, how far back that goes?

A. Oh, as long as I can remember, that is a good ways back.

Q. Have you ever come in competition with foreign cement, Mr. Letzkus?

A. No, sir.

Q. Well, have you ever entered into any agreement with any of your competitors to boycott dealers who dealt in imported cement?

37754 A. No, sir.

Q. Or have you ever had any agreements with reference to this matter at all?

A. Which matter?

Q. Imported cement.

The Witness: No, we have no agreements.

By Mr. Withrow:

Q. Now, did you put a stock of cement in Brooklyn in 1935?

A. No, sir.

Q. As a matter of fact, have you ever sold or shipped cement in Brooklyn?

A. Not to my knowledge.

37755 Q. And would you tell us whether or not you ever entered into any agreement that you were to use the rates contained in the Institute rate books, whether they were right or wrong?

37756 A. Absolutely no.

The original capacity of the Fultonham plant, when built in 1924, was 750,000 barrels. The capac-
37762 ity of the Fultonham plant has increased. Prior to the increase in the plant, we were able to sell all of the 750,000 barrels we could produce. I came with
37763 the company on January 1, 1925. We had approximately 750,000 barrels, and we sold the output and could have sold considerably more. Then I recommended doubling the capacity of the plant because at that time there were not nearly so many cement plants in Ohio as there are today. The board of directors agreed to furnish

the money and the Company started in to double the capacity. When it got through the Company had pretty close to a 2,000,000 barrel capacity. If we had not doubled the plant as we did at that time, we would not have been able to take care of our business, say, in 1930, which was the biggest year we ever had, when we shipped 1,400,000 barrels. That is the story of the increase. Then we got into the depression and were sorry we had so much cement.

When I have been talking about capacity, I am referring to the amount that we can absolutely produce and not to some theoretical figure.

37764 Mr. Withrow: I propose to show that because of the seasonal variation in demand, and because of the variation in demand from locality to locality, that it is necessary to have a certain amount of overcapacity. If Counsel for the Commission is willing to concede that point—.

Trial Examiner Norwood: I think you have shown it by dozens of witnesses that that is necessary, and that you do have to fill stock.

37765 A. If I understand the question, our shipments, of course, in January and February were very small. We are building up stock, because when we get into June, July, August, and September, we may ship substantially more than we could produce day for day, so we have to build up a stock, and we build that up during the winter, and we have it there in the bins and slip it during the busy season, a period of five or six months.

By Mr. Withrow:

Q. Now, in the stipulation we have entered into 37766 the term "mill net" has been used a number of times.

Will you tell us what you mean by "mill net"?

A. The mill net is the amount of money that we get at the plant after you take your bags or your freight or anything else there is off of it; that is the money left for us. And it is darned little.

37767 Q. Now, how many mills were there in Ohio when you came with the Cement Division of the Pittsburgh Plate Glass Company?

A. Let me think for a moment. I think there was only one, two, three—Alpha and Medusa, Bay Bridge plant, and Diamond. Later, after we started our increase, came in two mills at Osborn.

37768 Q. Mr. Letzkus, in listing those companies you did not mention the Superior or Castalia Company. Were they in existence?

A. I forgot those. That Castalia was in existence, a small plant. Superior, too, and it was very small.

Q. And was this number substantially increased after you came with the Cement Division?

A. Yes. By one, two, three, four—four companies and two silos, three silos; two at Cleveland and one over at Toledo, if that is pertinent to what you want to find out. They were not actual cement plants, but in the nature of it.

37769 Q. Mr. Letzkus, how many salesmen did you have in 1925 when you came with the Cement Division?

A. We had three when I went with the company on January 1st, and I put three more on, and had six. Today we have fourteen.

37770 In 1925 and in 1929, when we had six salesmen, our volume was 750,000 barrels, and I was obliged to take the men off the road for a couple of months. Then we got our increased capacity, and our shipments went on up to 1930, and from that point on they went down. The capacity in 1930 was the same as it is now, 1,875,000 barrels. In that year we had possibly twelve salesmen, I can't tell you exactly how many.

37771 By Mr. Withrow:

Q. Mr. Letzkus, have you ever entered into any agreement to allocate shipments or business between yourself and your competitors?

A. No, sir. We are out to get every barrel of business we can get regardless of what the other fellow does.

Q. Have you ever entered into any agreement to restrict the amount of cement that you would produce or sell?

A. No, sir.

37775 Mr. Withrow: No, Your Honor. I am offering those to show that this company has continually made efforts to get all the business that it could get,

37776 and to show both by direct evidence and circumstantially that it did not agree to allocate business or restrict production or restrict shipments in the sale of cement.

Mr. MacIntyre: The only issue here is whether these people have restrained price competition.

Trial Examiner Norwood: The objection is sustained.

37777 Q. Now, Commission's Exhibit 817-K, which is a letter dated April 23, 1937, contains the statement that you were having Standard Portland Cement Company ship some cement for you in your own bags. Do you recall that incident?

A. When was that?

Q. This was in the spring of 1937.

A. Yes, that is right.

Q. Would you tell us what the occasion for this was?

A. Well, that was in the Cleveland trucking area. We got a big order from Republic Steel, and at first we thought we were going to be able to ship it by rail. They insisted upon truck delivery. We would have lost our shirt if we tried to truck it from our plant up there, so I arranged to get cement from the Standard people, had them put it into our bags. They were trucking into Cleveland, anyway, so they trucked it in and filled the order for us.

Q. Are these two incidents that you have just mentioned the only instances of that kind which you recall, Mr. Letzkus?

A. Let's see. No, I remember one other case where another company shipped cement for us, but that
37778 was only a matter of a small amount, two or three cars. We had quoted on the State inquiry,—State of Pennsylvania inquiry; made a mistake in price. They wanted a price in cloth sacks and we quoted it in error in paper, 25 cents a barrel difference between the two packages. We would just lose a lot of money, tried to get out of it, could not do it, so we went through with our obligation and in order to save as much as we could out of the thing, we had—I think it was the Green Bag Company of Pittsburgh ship it from Pittsburgh because they had a shorter rate.

Q. Now, was that the incident during the N.R.A. Code period?

A. Yes.

Trial Examiner Norwood: Well, did Green Bag give you the benefit of the saving?

The Witness: No, sir; we got stuck, Your Honor, for the difference. We were obligated to the State Highway

Department. We shipped it at the price we quoted and took the loss ourselves.

Trial Examiner Norwood: But Green Bag shipped it from a nearer point?

The Witness: Yes. They got their full price, though, for their cement.

Trial Examiner Norwood: Well, did you ship yourself, any on that transaction?

The Witness: I do not know whether we did or not.

Trial Examiner Norwood: Except this difference 37779 in freight from Green Bag factory to your factory?

The Witness: Well, it would make a little difference, I think, Your Honor; but I think it cost us about 25 cents a barrel we were out of pocket, but we kept our word with the highway department.

By Mr. Withrow:

Q. Now, I believe your stipulation says that you usually are a price follower. Is there anything which prevents you from assuming price leadership, Mr. Letzkus?

A. Nothing that I know of if we want to do it.

Q. Do you have any agreement with any of your competitors not to assume price leadership?

A. Absolutely no, we do not.

Q. Now, is your company the controlling factor in the markets where you do business?

A. No, sir.

Q. Now, will you tell us briefly what the sales and marketing prices were in effect with the Pittsburgh Plate Glass Company when you first become associated with the company?

37780 A. They did not have very much policy at the time I went with them. They had three men scattered all over the country, and they changed all of that immediately, put more men on, cut down their territories, and made it a more businesslike arrangement.

By Mr. Withrow:

Q. Now, with reference to the pricing policy, would you tell us what sort of a pricing policy you found when you came with the company?

37781 A. Well, I think that the—when I went with them prior to my being in charge there, I think that they had lists or something of that sort with prices at certain points.

Q. And were the salesmen given those lists?
A. Yes.
Q. And who prepared those lists?
A. Somebody in the office set up of the company.
Q. And were they selling only at delivered prices?
A. Yes.
Q. Could you tell us, if you know, whether or not this list of prices were prepared as the result of information picked up in the field, or whether they were figures merely arrived at at the mill?
A. I cannot answer that for what they did prior to the time I went with them.
Q. Well, could you tell us what the results of their method had been? Had they been able to sell the complete capacity of the plant?
A. No, they were selling some cement, but not anything like capacity. You must keep in mind the fact that that plant was only started late in 1924. They only had three salesmen, and they were scattered, so it is hardly fair to judge them on that short period. You cannot work those things up and ship capacity right on two or three months' work.
Q. And are you the one who installed the pres-
37782 ent—their present method of carrying on busines?
A. Yes.
37787 Q. Now, in the event of a price increase, have you ever followed along on an increase and then found that some of your competitors had not done so?
A. Oh, I think I have run into a situation like that on one of two occasions. I cannot tell you when, but—
Q. Well, under those circumstances would you tell us whether or not you were able to sell your cement at the new high prices?
A. No, sir. As soon as we found out that certain companies were still selling at the lower prices, why, we went right back to it.
37788 The witness identified Resp. Ex. 2863 as a letter dictated by him to Mr. MacIntyre giving him some information he asked for in 1933. He vouches for the accuracy of the information. The source of the information was his own records as to shipments and the accounting department's records as to profit and loss.
37789 This information shows the position of the Cement Division of the Pittsburgh Plate Glass Company just prior to the increase of July 1933.

Mr. Withrow: Your Honor, I offer in evidence Respondents' Exhibit 2863, and if any question is made about the copy, the Commission has in its own possession the original.

Mr. MacIntyre: It is objected to as irrelevant and immaterial. That does not go to any issue that is raised in the complaint in this case.

Trial Examiner Norwood: What do you want to show about this?

Mr. Withrow: Your Honor, we have heard a great deal in this case about certain price increases, and how unreasonable it was because of the amount of the increase over preceding prices. Now, on July 7, 1933, there became effective in the territory where this witness marketed his cement delivered prices which were 25 cents a barrel higher than the delivered prices which existed prior to that time.

Now, I am trying to establish the fact which existed in this company at that time as bearing on the motives and reasons as to why this company was willing to advance its delivered prices or follow the lead in advancing the delivered prices 25 cents a barrel.

Mr. MacIntyre: Now, on the offer of that, Your Honor please, I would like to ask the witness a question on voir dire.

Trial Examiner Norwood: All right.

Examination On Voir Dire By Mr. MacIntyre

Q. Mr. Letzkus.

A. Yes, sir.

Q. Was there anything that occurred between the date on which you gave me this statement, April 22, 1933, and the dates on which the transactions occurred which are recorded in this paper which would have changed the position of the Pittsburgh Plate Glass Company's Columbia Cement Division showings?

A. Well, Mr. MacIntyre, I do not know what you mean.

Q. Well, as to increases in prices?

A. Certainly, we know this, in 1930 we made a profit.

37791 Q. Yes, I call your attention, if you need to refresh your memory on that, to your stipulated tes-

timony this morning. Doesn't that show substantial price increases in the latter half of 1932, just as a territory?

A. Yes, I was going to tell you that.

Q. Yes.

A. That in 1931 the price was very low, part of 37792 1932, both years we had a very heavy loss.

Q. Just a moment. Don't give us the contents of that document that you are putting in there, telling us what it shows that your company had. I move that that part of the answer be stricken because we are going to try to show you the document is not relevant or material.

Trial Examiner Norwood: The motion is allowed.

By Mr. MacIntyre:

Q. Now, will you tell us about these price increases during the latter part of the year 1932, there were substantial ones as shown by your stipulated testimony this morning; isn't that correct?

A. Yes.

Q. And that would have changed radically the position of your company as to its operations for the last half of 1932 and the first half of 1933 compared with the previous period; isn't that true?

A. If you mean that we would not lose so much money, I would say yes, obviously.

Q. You cannot tell whether it amounted to a profit or a loss?

A. Yes, you can tell.

Mr. MacIntyre: Well, now, if Your Honor please, I object to that on the further ground that the offer of proof as made by Mr. Withrow does not add at all to any reason why it should be received in evidence. As to 37793 subsequent price increases in 1933, of course the company probably wanted to make more profit in 1933, 1934, 1935 than it had made in 1932, as a result of this price increase in 1932, so therefore what is shown by that document to have been its position in 1931 and 1932 could not therefore be used as a basis for its determination to follow a price increase in 1933.

Mr. Withrow: Your Honor, I just want to say one thing: I think Mr. MacIntyre has misrepresented the situation.

If Your Honor will look at the stipulation you will find on August 11, 1932, there was a certain price level that on

October 1, 1932, there was a substantial reduction in price; on December 9, 1932, there was a little increase in price; that in March, 1933, there was an attempted increase in price which failed, and that this one, this increase we are talking about in July, 1933, this was an increase over the level which occurred in 1932, and in April, 1933, this witness wrote a letter showing what the losses were; in other words, this shows exactly what the position was, and Mr. MacIntyre's question about whether there were substantial increases misrepresents the record.

37794 Trial Examiner Norwood: Well, now, about these figures here, can this witness testify of his own knowledge as to their correctness?

Trial Examiner Norwood: Well, this is signed by the sales manager.

The Witness: That is me.

37795 The objection is sustained.

37796 By Mr. Withrow:

Q. Do you recall a price increase in the territory around Cleveland early in 1936, Mr. Letzkus?

A. Yes. I think there was an increase there.

The witness identified Resp. Ex. 2864-A as a memorandum he received from "our" salesman at Cleveland; Resp. Ex. 2864-C is from another salesman in Mansfield, Ohio. The witness identified Resp. Ex. 2864-E, together with its enclosure, F, as something that he also received from another salesman, along with the Lehigh printed quotation he picked up in the field; Resp. Ex. 2864-H, I, J, L, M and N as memoranda he received, together with attached

37797 information. They are all from various salesmen of the company, along with a written quotation that they picked up; Resp. Ex. 2864-B, D and L, as telegrams and memoranda sent by the witness. These are instructions sent out by him to "our" salesmen. Resp. Ex. 2864-P is from "our" salesmen at Zanesville. These were sent and received in the regular course of business.

Q. Would you look at Respondents' Exhibit 2864-A, and I will ask you if that was the first information which you received about the increase in prices in January, 1936?

A. I judge that it is.

Q. Now, on this telegram, Respondents' Exhibit 2864-B, it is dated January 3, 1935. Would you tell us—

A. Yes. That is. That was sent out the next day after I got this information from our Cleveland salesman.

Q. One of them is dated 1935 and one of them 1936. Could you tell us anything about that?

A. I do not know which one is wrong.

Q. I will show you the rest of the file and see if
37798 that will help you.

A. Well, I think this wire, it is purely a typographical error on the part of the stenographer. I have had those before from the same stenographer.

Mr. Withrow: Your Honor, I offer in evidence Respondents' Exhibit 2864-A to P (handing the documents to Mr. MacIntyre).

The Witness: That stuff was all in 1936, not 1935.

By Mr. Withrow:

Q. 1936?

A. 1936, but that one wire I said was an error on the part of the stenographer. That should have been 1936, too, and I never caught it when it went out.

Examination on Voir Dire by Mr. MacIntyre.

Q. Referring to Respondents' Exhibit, for identification, 2864-F. Is that your receipt stamp on that carrying the date January 6, 1936?

A. Yes. I think it is, Mr. MacIntyre. I cannot read it, but it looks like it.

Q. Can you tell me what time of day you received that quotation?

37799 A. No, sir. Our mail comes in to us three times a day, and we just stamp it on, but it is not on the stamp evidently.

Q. But it was received by you on the 6th of January, 1936; is that correct?

A. That is quite possible.

Q. That is what your repeat stamp shows there?

A. Yes.

Q. Now, referring to Respondents' Exhibit, for identification, 2864-J, what does that show as to the time that you received that quotation in your office?

A. January 4th.

Q. January 4, 1936?

A. Yes.

Q. What time of day?

A. No, I do not know. I cannot tell. I do not know what time of the day it was, Mr. MacIntyre.

Q. Can you tell me whether it was before or after you dispatched your price memorandum, which is Respondents' Exhibit for identification, 2864-L?

A. Well, this went out on the 4th, and our mail generally goes out in the evening, never during the day, and they come around and take it out at night.

Q. It is not your testimony that that went out afterwards, is it?

A. After what? After this came in?

37800 Q. Yes.

A. Well, I am not prepared to say whether it went out afterwards or not, because I do not know when this reached here, reached us, but it is quite obvious from those same papers there that the day before we had a telephone conversation, if I recall correctly, from a Mr. Bathgate at Cleveland, and he gave us there sufficient evidence to justify sending out this letter, which makes it pretty difficult—

Q. Well, whatever action you took at that time was not based entirely on what is shown by Respondents' Exhibit, for identification, 2864-F, J, and N; is that correct?

A. Now, wait a minute. Let's get the whole thing together here and get this clear. Where is that other paper that you have here?

(Mr. MacIntyre hands documents to the witness.)

A. Now, this is all I need.

Now, this thing is dated January 3, this telephone conversation, Mr. Bathgate, salesman, 4:30 in the afternoon, telling us about this change in price, that is the 2d. Now, on the 4th this letter that goes out to the salesmen, referring to our telegram yesterday, advising that it was rumored that the Cleveland base has advanced from $1.50 to $1.65. We have confirmed this information as being correct and that quotations are out to the trade effective January 8th. Now, it seems to me that all the evi-

37801 dence you need here is right here in this confirmation.

Q. Well, now, this statement of yours in Respondents' Exhibit 2864-L to the effect that you had confirmed it did not mean that you had confirmed it by this exhibit, Respondents' Exhibit 2864-F, which is dated January 6th?

A. No. I would say that this one here probably did not get into our office, but it is quite possible that a salesman might pick—that is where we would get it, from a salesman, he might have called in on that, and by the time it reached

us it would be the 6th. I do not think that you can, in fairness, assume that that was not the fact. You got the evidence there of how we got it, and what I want to make clear is that this is the only way that we find out what prices are being quoted, and it is a hell of a job to keep checking those.

37802 Q. Now, one further question, Mr. Letzkus: Does this Respondents' Exhibit 2864, for identification, contain all the price information that you had received in connection with that price change at Cleveland on January 6, 1936?

A. I would assume that it has all of the documentary evidence that I received. Now, whether there was any telephone conversation from the salesmen that might have contributed to that, I do not know, but usually when I get anything like that I make a note of it, and put it all in the same bundle, and what salesman it comes from.

37803 (RESP. EX. 2864-A to 2864-P was offered and
37804 received in evidence.)

Direct Examination by Mr. Withrow (Continued).

Q. Did you discuss this increase in price with, or were you informed about it by any of your competitors, Mr. Letzkus?

A. Not that I can recall.

Q. And in the event of an increase, or in the event of a change in price or change in quotations which your salesmen find, do they or do they not report what quotations they have on hand before you actually receive them in the office?

A. Yes.

Q. And are they instructed to do so?

A. Absolutely.

Q. I show you Commission's Exhibit 2384, and ask you if this refreshes your recollection as to when you decided to follow that increase in price you found in January, 1936?

A. Yes. This indicates that we met that advance on January 7th, and is in the form of instructions to the salesmen to that effect.

37805 Q. Now, in this instance here, in January, 1936, the documents show that there were rumors of an increase in price before any quotations were in the field. Has that ever occurred at any other time?

A. Oh, I do not know whether I could say that it does or not. But there are a lot of cement salesmen running around and they meet and they talk and they guess, but I think it is hardly dependable evidence at all. Now—

37815 Q. Mr. Letzkus, whether or not your competitors mail to you a list of their price bases?

A. They do not.

Q. Now, your stipulation indicates at what time there was a so-called base at your mill at Fultonham. Did anybody inform you by telephone call or by letter that your mill was to become a base?

A. No, sir.

Q. Do you have any agreement or understanding with your competitors as to what mills shall be base mills and what mills shall be non-base mills?

A. No, sir; we do not.

37816 Q. Do you ever enter into any agreement with any of your competitors as to what the base figure should be at any mill?

A. No, sir.

Q. Now, I believe the record shows as of July 1, 1937, for example, your mill was a non-base mill; is that correct?

A. That is right.

Q. Have you ever considered, Mr. Letzkus, establishing a maximum mill net or base figure at your mill?

A. Naturally I think of it from time to time, but never did anything about it.

Q. Well, what figure did you have in mind that you would like to receive at your mill as your maximum net?

A. Well, I would like to, and would be very happy if I could get 1.75, say.

Q. That is before or after—would that include, or not include the cash discount?

A. That would include the cash discount and give us a net. Now, that is just a tentative figure. I would like to have more than that if I could get it, but that would be a fair base.

New York, N. Y.,
Wednesday, May 1, 1940.

L. C. LETZKUS thereupon resumed the stand and testified further as follows:

Direct Examination by Mr. Withrow (Continued).

Q. Mr. Letzkus, do you make any sales of cement at Fultonham?

A. You mean at the plant?

Q. Well, I mean to any dealers or contractors.

A. No.

Q. Well, is there any dealer in that territory to whom you do make some occasional sales?

A. Well, there is a dealer at a little town called Fultonham that is just adjacent to our plant, right adjoining the property.

Q. Does he purchase a large quantity of cement?

A. Oh, no, I don't think he would take over a car, possibly two cars a year.

Q. I show you Respondents' Exhibit 2866-A, B, C, and ask if these are invoices to that dealer in Fultonham during the year 1937?

A. They are.

Q. Are those, to the best of your recollection, all of the shipments made to that dealer in 1937?

A. No, I could not say whether this is all or not, without checking up.

Q. Well, do you know, Mr. Letzkus, of any year where this dealer has taken more than, say, five cars of cement in any one year?

A. No, I doubt if he ever would.

Trial Examiner Norwood: What is the importance of that?

Mr. Withrow: We will come to it in just a minute, Your Honor, with this next document.

I am going to show the effect, if possible, of establishing a so-called base at this company's mill, or, in the alternative, of establishing a flat mill price at this company's mill. He has already testified, yesterday, that he considered installing a base or putting a maximum mill net in at his mill.

Trial Examiner Norwood: Oh, I think he could show what the effects would be if he can produce facts to show whether or not is bearing on a reasonable or unreasonable restraint of trade.

Mr. Paulson: How could that bear on that question? I do not see it. This complaint does not contain any matter which should be taken, or would indicate that the Respondents will be required to sell f.o.b. mill.

Trial Examiner Norwood: No. You have evidence in here that this method is uneconomical, and all that
37825 sort of thing, and he has a right to show what the effects would be of selling exclusively f.o.b. mill.

Mr. Paulson: Oh, I do not think so at all because the issue here is solely, do these Respondents price their product concertedly and collusively.

Now, we do not care at all whether they price—so far as the complaint is concerned, there is no point made of whether they price f.o.b. mill or whether they price f.o.b. destination.

By Mr. Withrow:

Q. Mr. Letzkus, I show you Respondents' Exhibit 2857-A to D, and I will ask you to examine it and tell us whether you can vouch for the accuracy of the figures con-
37826 tained in the two columns entitled "Competitor's Lowest Quoted Price," and "Price Figured on 2.15 E. Fultonham"?

A. Yes, these prices are all right.

37828 *Examination on Voir Dire by Mr. MacIntyre.*

Q. Referring to Respondents' Exhibit 2857-A to D, Mr. Letzkus, if you in putting in a base at your mill would use any of the range of base figures that has at any time in the past applied at your mill, wouldn't you be below the quoted prices of any of your competitors in the territory shown on that exhibit?

37829 A. Well, yes.

The Witness: Do you want any explanation?

Mr. MacIntyre: I do not believe it is necessary, Mr. Letzkus. Thank you very much.

Direct Examination (Resumed) by Mr. Withrow.

Q. You heard what Mr. MacIntyre said, Mr. Letzkus.
A. Yes.

Q. Would you just give us your explanation?
37829½ A. We had a base, so-called, at the plant once of $1.06. Obviously, that would be entirely unsatisfactory to us, and we would not sell our cement at that price continuously unless we wanted to go broke. Now, we are in business to make some money, and I figure $1.75 less 10 cents cash discount would be about as low as we would care to go. So that we would be able to make a little bit of money because you men must take into consideration when you have a base, or whatever you choose to call it, at a cement plant, it means to us the money we get for the cement there at the plant.

Now, you have only got a small area that you can get that higher price, and, obviously, it ought to be clear that you have got to go to more distant points to get enough tonnage to operate the cement plant, and as you spread out from it you are meeting competitive conditions, and that so-called mill net begins to shrink, and we end up at the end of the year with an average, and you can't run a business any other way.

Now, if we had $1.06 at our cement plant, as was there for a while, you can easily imagine what would happen if we had to keep moving further out, and there were equally low bases at these other mills, we would not have enough money to pay for postage stamps. You must get something around your own mill where your most desirable business is located, and you must expect that your average
37830 mill net is going to be lower if you go out to get enough business to operate a cement plant.

Q. Mr. Letzkus, just one more question: Yesterday we identified a paper, a letter that you wrote to Mr. MacIntyre. Could you tell us what the effect of your operations, say, in the year when you had a base of $1.06 at your mill, were as far as profit and loss is concerned?

Trial Examiner Norwood: You may state any factual matter there as to whether or not—

Trial Examiner Norwood: —you reduced your returns or increased your returns, or what was the effect?

A. Why, it reduced our returns tremendously, and we had a loss, heavy loss.

37831 *Examination on Voir Dire by Mr. MacIntyre.*

Q. Didn't you, during that period, Mr. Letzkus, ship into the City of Cleveland, which was operating on an 85-cent net base price?

A. Offhand, I cannot tell you whether we were shipping at that time. If we did, it was probably because we had had a contract in there on which we were obligated, and as the price went down, we would have to go down with it, but certainly we were not seeking any business at that price.

37832 (RESP. EXA 2867-A to 2867-D, was offered and received in evidence.)

37833 Mr. Paulson: I just wanted to make clear what I understand the Commission's position to be. I know of no exhibit to show the effect of f. o. b. mill 37834 selling, or the effect if these Respondents were confined to f. o. b. mill selling.

The Commission has taken the position that is not in issue. I do not believe the economists testified on that point. I do not believe there is a scintilla of evidence in the Commission's case whereby we seek to prove that f. o. b. mill selling is more advantageous and better than the delivered price selling. We have made our case out on the point that these Respondents concertedly and collusively determine prices and eliminate competition, particularly price, and this complaint, as I understand it, is a challenge and a charge against them about their concert in the selling, and looks towards a settlement and cessation of concert.

37835 By Mr. Withrow:

Q. About how much cement do you sell in Zanesville, Mr. Letzkus?

A. Oh, that would vary from year to year. I would say, just as a statement, maybe from ten thousand, possibly, to twenty or twenty-five thousand, depending on whether or not some year there might be some big job in the community.

Q. And under normal circumstances, what proportion of the business in Zanesville do you sell?

37837 A. I cannot tell you down to the barrel; but we probably are getting around 90 percent of it, anyway; maybe 95.

37844 Q. Mr. Letzkus, do you have any agreement with your competitors as to what your terms and conditions of sale will be?

A. No, sir; we do not.

Q. Well, have they always been the same?

A. In the discounts?

Q. Yes.

A. Oh, away, away back there was a difference, but for a good many years it has been just the same as we have now, 10 cents a barrel cash discount 15 days.

Q. When you say "away, away back," do you mean before you came with the Pittsburgh Company?

A. It seems to me that it was prior to that. Now,
37845 I do not want to definitely make that statement. There was some difference back many years, but it is so far back that it does not enter into our business office today, and I have had no occasion to recall it.

37846 Q. Now, back in July or June, 1937, did you pre-pay the freight to all your customers?

A. 1937? No.

Q. And when the customer paid the freight to the railroads, for whose account did he pay it?

A. He paid it for our account, and we allowed it on the invoice.

Q. Now, in the case of any damage in transit, did you take care of that, or was that on the customer's responsibility?

A. On rare occasions the customers might—he was required to make notation on the freight bill or bill of lading, and in some cases they might try to collect, themselves, but in most instances we took care of it, ourselves.

Q. Now, Mr. Letzkus, have you ever permitted customers to take truck delivery of cement at your mill?

A. Yes.

37848 Q. Do you still permit trucking, Mr. Letzkus?

A. No, sir; excepting possibly very rare occasions of emergency, what I mean by that, somebody
37849 might have a job right close to the plant, and needs a few barrels to finish up some night, or something of that kind, I might make an exception, but it is very, very rare.

Q. Now, when was it that you allowed trucking generally from East Fultonham?

A. Oh, I think that was back—I don't know, 1931 or 1932, somewhere along in that area.

Q. And on what basis were sales made by truck during that time?

A. Delivered price.

Q. And what, then, did the customer pay you?

A. Well, we deducted the freight rate, and he would come and get it by truck.

Q. Now, give us an example. Suppose a dealer from Zanesville came in, what freight rate would be deducted?

A. Well, I think at that time the rate was, I guess, 25 cents a barrel; since changed.

Q. So, to make it clear, you took the delivered price at Zanesville?

A. That is right.

Q. And deducted 25 cents?

A. Yes.

Q. And then he paid you that figure for taking it at the mill?

A. Now, if you want me to—

37850 Trial Examiner Norwood: In other words, he got the benefit of the freight, did he?

The Witness: Yes. But there were three different ways, Your Honor: I think you should perhaps know about. Now, during that trucking period there was trucking up around Pittsburgh.

Mr. Withrow: Yes. Will you tell us about that Pittsburgh trucking.

The Witness: And we had been shipping in there by rail, but the local plants there were trucking, they had their mill price plus the bags, so we had customers there we had to take care of, and I established a little warehouse there where we sold, I don't know, possibly a car or two a day, and we charged there at the warehouse the same price that those other plants were charging at their mills. The result was that we furnished certain dealers in the small area around our warehouse. The other fellows did not get in there because it all centered on the distance haul from the warehouse or the plant, wherever they wanted to take cement. Now, that is different, now, over in northwestern Ohio—

Trial Examiner Norwood: Now, the method that you described to me a while ago was tantamount to selling these dealers f. o. b. mill, wasn't it?

The Witness: In this Pittsburgh area?

37851 Trial Examiner Norwood: Yes.

The Witness: Yes, the other was at Zanesville, was destination prices.

Trial Examiner Norwood: But you gave him back the freight, the amount of the freight, didn't you?

The Witness: Well, you can take it that way, but we probably had—if somebody else had hauled the thing, we might have had to pay the freight on it. The same thing any way you take it. Now, you get over into—

Trial Examiner Norwood: But when you sold it that way, and you allowed him the freight, isn't that the same as selling him f. o. b. mill; I mean, doesn't he get the same figure?

The Witness: Oh, yes. Yes; you get the same figure, but the principle is different.

Trial Examiner Norwood: Go ahead.

The Witness: Now, over in northwestern Ohio it is still a different condition. That is up around Toledo and several counties there, and quite a good many small dealers there, and Huron Company, and I think Medusa and some others were trucking in that location, so we established a warehouse at Bowling Green. Now, there we shipped our cement by car, loaded it, put it into the warehouse, and then we hired a trucking concern to deliver it in small quantities to wherever it is supposed to
37852 go, and we pay the truck definitely. We sell the cement destination price, and we do not allow any freight rate there; simply hire somebody and do the delivering that way. Now, there are three different methods.

Trial Examiner Norwood: Now, when did you discontinue that?

The Witness: Trucking at Pittsburgh and Zanesville, I guess that must have been, oh, your records here will show it. I think it is late 1932, or somewhere along in there. Have we got anything that will show it?

Mr. Withrow: We will come to that.

Trial Examiner Norwood: You haven't done any trucking since then?

The Witness: Yes, we are still trucking up at Bowling Green.

Trial Examiner Norwood: How is that being done?

The Witness: I just explained to Your Honor we sell delivered.

Trial Examiner Norwood: You said Zanesville, did you?

The Witness: Zanesville.

Trial Examiner Norwood: I thought you said Zanesville.

The Witness: No, Zanesville is out, that is the plant location, and Pittsburgh was a warehouse. Those were both through long ago. Bowling Green continues,
37853 and we are obliged to keep on trucking to meet that competition there, although we do not want to do it.

By Mr. Withrow:

Q. Now, starting backwards on your story, up around Bowling Green, why is it that you truck and pay the trucker up there as against the method you employ down from your mill in Pittsburgh?

A. Well, it was the competitive conditions are different. We were just meeting the local competition. Now, up in Bowling Green, those competitors that I mentioned a while ago are all trucking cement and delivering, and we naturally have to do the same thing.

37854 Q. Now, you said a few minutes ago, about the volume of business that went through the Pittsburgh warehouse. About how much tonnage moved by truck out of your mill at Fultonham?

A. Oh, I could not tell you that without checking it up. We did not truck there for a great length of time, and as I recall there was some State highway jobs around in that area, near Zanesville, and one contractor had a lot, and he was really the big trucking customer that we had, and he was trucking cement to these jobs.

Q. Now, how about the dealers, did the dealers in that territory take very much?

A. Well, their normal use, requirements, whatever they were, but you must remember around in the area of Zanesville there are no big dealers. There are no big markets. The area of possibly 50 miles around our plant is all small stuff, no big dealers there.

Q. Now, how about the cost of loading trucks at your mill compared with the cost of loading freight cars?

A. It was more expensive. It interfered with the loading of our cars at the same time.

37855 Q. Now, during this period when you had trucking at your mill, did you ever add a 15 cent differential to take care of this added cost?

A. I do not recall whether we ever did that or not. I doubt it. I don't think we ever did.

37856 Q. Now, was your mill constructed with the possibility, or with the plan in mind of using truck delivery?

A. No, sir.

Q. Now, you testified, or told the Examiner, that you discontinued trucking at your mill except under unusual circumstances.

Now, what were your reasons for discontinuing trucking?

A. Well, I am definitely opposed to trucking be-
37857 cause I think it is harmful to our business.

Q. And by "our business," you mean the Pittsburgh—

A. I mean the company's business.

Trial Examiner Norwood: In what way?

The Witness: Well, they are not situated right, Your Honor, on account of the location of our plant, there is not enough tonnage around in that area to help us a great deal, and if we truck, and if every other cement company trucks, it simply puts us out of markets that we cannot get into except at great expense.

Trial Examiner Norwood: How does it do that?

The Witness: Well, take, for instance, up at Cleveland. To give you a practical demonstration here, there is trucking all over the City of Cleveland. Now, that is only a matter of possibly 130 or 140 miles from our plant, and we cannot truck up there, couldn't begin to do it, and we, as a matter of fact, get no business out of Cleveland because we would have to ship it up by rail. We have to hire a warehouse, and we would have to have men in it, we would have to load the cars, we would have to re-load the trucks, and we have got to take it out and bear the expense of putting it into the dealer's warehouse or to a job. Now, by the time we paid all that we would lose plenty money, so the result is that we solicit no business in the Cleveland area unless it would be carload
37858 business, and we cannot get that because everybody can take a truckload, fifty or sixty barrels; they do not have so much money invested, they do not have to stock so much cement at a time, and they can get it quicker.

Now, if we attempted to truck from our plant—I have checked up on the thing, even if I could get a price that would permit us to truck it up there for, say, approximately the present freight rate on rail cars, that would still keep us away, out of the market, because a man—

Trial Examiner Norwood: You are talking about local trucking?

The Witness: Well, there may be some advantage in local trucking, but we do not have any inquiry for trucking down around our plant, and it is just unnecessary. Nobody seems to want it.

Trial Examiner Norwood: Go ahead.

The Witness: Now, Your Honor, I was at the point of saying if we trucked to Cleveland we could only make one trip a day, and over those hills, probably could not carry over 60 barrels. Now, you would have to have an awful flock of trucks if you ever wanted to keep a job running—

Trial Examiner Norwood: I think you have answered my question.

37859 Q. Now, Mr. Letzkus, I show you Respondents' Exhibit 2872-A to F, and ask you to tell us in whose handwriting that is?

A. That is mine.

Q. And what does it purport to be? Don't tell us the contents, but what is it intended to cover?

A. That is the cost of fixing up the warehouse in the City of Pittsburgh.

Q. Now, could you tell us what the arrangement was on leasing that warehouse?

Mr. MacIntyre: Just a moment. I object to that. It is immaterial.

Trial Examiner Norwood: The objection is sustained.

Mr. Withrow: Well, I thought Your Honor might wait and hear what I had to say.

Trial Examiner Norwood: I do not need to, to see that it is exceedingly remote. He has already told us it cost more to truck to Cleveland, and he has covered that point.

Mr. Withrow: Counsel for the Commission have attempted to prove that there was conspiracy to discontinue trucking at Pittsburgh on December 1, 1931, and I am now going to show through that document here why this

37860 company discontinued trucking on December 1, 1931, and had the witness been allowed to answer the question the reason would become apparent.

Trial Examiner Norwood: He has already told us that. The objection is sustained.

Proceed.

Mr. Withrow: I offer to prove through the testimony of this witness, and through the document which he has in

his hand, Respondents' Exhibit 2872-A to F, that the witness established a warehouse at Pittsburgh, and that at the time of establishing the warehouse he entered into an agreement with the owner of the warehouse whereby he secured free rent, or paid no rent for the use of that warehouse up until December 1, 1931, on which date if the Respondent Company, the Pittsburgh Plate Glass Company, elected to continue the warehouse the rent was to start running, but there was no agreement after that time to pay rent on the warehouse.

Mr. Paulson: I cannot understand Counsel's logic in offering this type of proof. They say that because the witness had a reason for discontinuing trucking he did not conspire. They have done that all through this case. It seems to me that is irrelevant and immaterial. I move to strike—

37861 Trial Examiner Norwood: Now, wait just a minute.

Mr. Paulson: May I make one objection without being interrupted?

Trial Examiner Norwood: The discussion on this is closed, and I have made my ruling.

Mr. Paulson: I have not gotten up once in two days without being interrupted.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Mr. Paulson: I want to note a protest on the record to the Examiner interrupting Counsel for the Commission on each and every objection.

Trial Examiner Norwood: Now, the Counsel is out of order when he begins to discuss a point after I have ruled. I want the record to show that Counsel is out of order and persists in being out of order.

Mr. Paulson: I want to know if it is out of order to move to strike.

I think this offer of proof is improperly on this record, and I move to strike it.

Trial Examiner Norwood: Now, the Counsel is in order and I deny the motion.

Mr. Paulson: There evidently was a misunderstanding between Your Honor and I, because I was making

37862 that motion when I was interrupted.

Trial Examiner Norwood: The motion is denied. The proffer is rejected. Both Counsel have their exception.

Mr. Withrow: Your Honor, I do not think the record shows, I offered Exhibit 2872-A to F. I was going to. I assume Your Honor anticipated my offer in ruling.

Trial Examiner Norwood: Yes.

By Mr. Withrow:

Q. Do any of your dealers object to your allowing persons to come to your mill and take delivery at the mill for trucking purposes?

A. Yes. We had complaints, scattered complaints, from dealers. They objected to it, did not want it.

Q. Now, when you discontinued trucking at Fultonham, and also in Pittsburgh, did you lead off and discontinue trucking while your competitors continued?

A. Oh, I don't know whether we quit first, or whether somebody else quit first, but we were mighty anxious to discontinue trucking at the first opportunity we had if we could still be in position to retain our business.

Q. Well, did you enter into any agreement with any of your competitors?

A. No, sir.

Q. To discontinue trucking?

37863 A. No, sir.

Q. Now, I believe that you testified as to why you discontinued trucking at Fultonham. I will just ask you, even though it is leading, whether or not the same reasons apply for your discontinuance of trucking at Pittsburgh?

A. I would say so, yes.

Q. Were there any added reasons at Pittsburgh? If there were, would you just tell us?

A. No. I think the conditions were general. We wanted to get out of that expense.

Trial Examiner Norwood: You say you tried it up there with a free warehouse?

The Witness: Where? Pittsburgh?

Trial Examiner Norwood: Yes; and found it expensive, and you came to the time to hire a warehouse, and go to further expense, you decided you would stay out of the trucking game there; is that right?

The Witness: Well, we had to ship that stuff into Pittsburgh, we had to pay at that time, I think, 49 cents a barrel.

Trial Examiner Norwood: Well, does my statement describe your situation there with respect to the warehouse?

The Witness: Yes, it was too costly, and we did not want to continue any longer than we absolutely had to, but we wanted to retain our customers there. If
37864 we had to retain it longer we would have had to have gone to that expense, so when we had a chance to give it up, we were mighty glad to do it.

By Mr. Withrow:

Q. Now, there is—Commission's Exhibit 1363 refers to a movement on foot to have a number of companies announce the discontinuance of trucking at Pittsburgh effective December 1st. Do you know anything about the movement referred to?

A. No.

Q. Were you a party to any such movement?

A. No, sir.

37865 The witness identified Resp. Exs. 2874, 2875 and 2876 as letters from him to a salesman, to an employee in the accounting department, and to his assistant; Resp. Ex. 2877 as a memorandum of a telephone conversation from a dealer at Ashland, Ohio, to witness who made that notation thereon; Resp. Ex. 2878 as an announcement by a competitive cement company sent in to Pittsburgh Plate Glass by one of their salesmen;

37867 (RESP. EXS. 2874, 2876, and 2878, were offered and received in evidence.)

By Mr. Withrow:

Q. Now, Mr. Letzkus, did you enter into any agreements with dealer-associations to discontinue trucking?

A. No, sir.

Q. Have you entered into an agreement with railroads to discontinue trucking?

37868 A. No, sir.

37871 Q. Now, you told us about your warehouse at Bowling Green. Did you ever have a warehouse at Defiance, Ohio?

A. Yes, for a little while prior to Bowling Green. We were in there just for a short time, for the same purpose. The question was of location. And then we went over to Bowling Green because it was a more satisfactory section for us.

Q. And you trucked from Defiance, as you described, as you trucked from Bowling Green?

A. Yes, same as the Bowling Green situation.

37874 Q. Mr. Letzkus, do you recall the circumstances under which trucking commenced in northwestern Ohio in August, 1935?

A. Well, our salesmen naturally found out that competitors were trucking to the dealers in that area, and reported it to us, and it was a case of either meeting that competition or else losing those customers. So we started to truck to meet the competition, and we have been doing it ever since. That is about the gist of it.

Q. Now, did you find that all of the companies doing business in that area met truck competition?

A. Oh, several of them did, or some of them trucked from as far as, over at Cleveland, clear over in
37875 Cleveland, others up in Michigan came in there.

Q. I will show you this document which the Examiner would not let me have marked, and ask you if that refreshes your recollection as to what took place?

A. Why, I can very definitely state now Alpha
37876 was allowing 8 cents a barrel.

Q. Did you meet that competition of Alpha?

A. Yes.

Trial Examiner Norwood: When was that?

The Witness: This was back in 1938—wait a minute. No. 1935 I guess this is. August 3, 1935. Yes. We met that. I think other companies did, too.

By Mr. Withrow:

Q. Now, in connection with your trucking practice and meeting Alpha's reduction, did you enter into any agreement with any of your competitors about that?

A. No, sir. When we found that other companies were doing it, we endeavored to be competitive by doing the same thing, or as close to it as we could find out as to what we could do to retain our customers.

Q. And into just what area do you truck cement in northwestern Ohio?

A. Now, let's see. Toledo and I think there are six counties around the Toledo area.

37881 Q. Did you, Mr. Letzkus, have any agreement with any of your competitors as to the territory in which trucking would be carried on in northwestern Ohio?

A. No, sir; we did not. We met the trucking competition wherever we found it, and we found it, I think, in those six counties, or seven.

37883 Q. Do you ever ship any cement by barge?

A. Yes, occasionally.

Q. Is that direct from your mill?

A. We ship by rail from our plant to a place called Pomeroy, on the Ohio River, where we lease the docks, a small dock. Cement is taken from cars there and put on boats at that point and carried to wherever it is supposed to go.

Q. And to those destinations where you have used water delivery, would you tell us whether or not the overall cost of transportation to you was higher or lower than the all-rail cost of destination?

Trial Examiner Norwood: Were those prices based on rail?

37884 The Witness: Yes, sir.

Trial Examiner Norwood: The objection is sustained.

37885 Mr. Withrow: I offer to prove through this witness that on the shipments which have been made by water by this company there has not resulted any cheaper cost of transportation than all-rail delivery to those destination points.

37887 By Mr. Withrow:

Q. Do you solicit and sell cement in territory where there are land-grant rates, Mr. Letzkus?

A. No.

37889 Q. I show you Commission's Exhibit 1339, and ask you if you are familiar with that inquiry from the Federal Government?

A. Is this that so-called Black Friday bid?

Q. I believe it has been called Good Friday and Black Friday.

A. Well, we had it.

37890 Q. Did you agree with your competitors not to bid on this inquiry?

A. No, sir; we did not talk to anybody about it, or competitors.

37891 The witness identified Resp. Ex. 2880 as a memorandum in his own handwriting prepared in connection with his consideration of Com. Ex. 1339 at that time. He jotted down the advantages and disadvantages, trying to figure out whether or not "we" were interested in bidding on it. As a result of this study, and Pittsburgh's dealers' reaction, they did not bid.

37892 Q. Mr. Letzkus, I show you Respondents' Exhibit 2881 and Respondents' Exhibit 2882, and ask you if these were prepared in your office in connection with this Commission's Exhibit 1339?

A. Yes.

Q. And would you tell us what you were trying to find out by using these maps in connection with this Good Friday bid?

A. Trying to find out what the area would be in which we probably would get any business if we bid on it; would be shipping.

Mr. MacIntyre: We object to all three exhibits in the pending offer because we consider them incompetent, irrelevant, and immaterial among other grounds because of their self-serving character, hearsay, speculative opinions.

37894 Trial Examiner Norwood: Well, I sustain the objection on the ground that they are documents and papers made out by this witness; as he is on the stand, he can tell us anything that is material or relevant concerning these transactions.

37895 Q. Would you tell us your reasons both for what you thought would result if you quoted, and what you thought would result if you did not quote?

A. Well, the inquiry was very indefinite. We did not know what we were going to get, did not know when you would ship it, or what we would ship, and on top of that we would be taking business that ordinarily was going through dealers; we probably would have some reaction from dealers; it was altogether the combination of those things made it a very undesirable thing to bid on, and there was too much uncertainty about it. You could not run a cement mill under those conditions. You have to know what you are going to ship and what they want.

Q. Now, what benefits do you think might accrue to you if you did not quote?

A. Well, we probably kept the good will of many of our dealer-customers. We avoided the possibility of having a lot of cement on hand that would never be taken out. We avoided the possibility of having cement go to the most distant point on our quotation on which we would make very little profit. We avoided the possibility of making up different kinds of cement, filling up our bins with it that we might need for our regular stock in trade; and

altogether it was just something that you could not tell where you were going to get off on, so rather than take the risk we did not bid.

37896 Q. Now, in this connection did you attempt to see, or find out in that territory a mill price at your mill would give the Government the lowest destination cost if your competitors also bid mill prices?

37898 A. Yes. That was the purpose of those maps, to get some idea of what the area would be.

Q. Just one more question, Mr. Letzkus, on this map; Is it this area surrounded by the dotted red line 37899 which you determined would be the area where $1.50, a mill price of $1.50 at Fultonhain would probably give the lowest destination price?

A. Yes, that is the red line.

Q. The dotted red line?

A. Yes.

Q. Now, on Respondents' Exhibit 2882, are these the lines of equal freight rates between the mills?

A. Yes, I think that is what that was. Yes, I think that is it.

Trial Examiner Norwood: Now, are you considering that with the idea of meeting the competition at any point the Government might designate?

The Witness: No, in a certain relative radius of the plant.

Trial Examiner Norwood: That is considered from the standpoint of meeting competition?

The Witness: Oh, yes.

By Mr. Withrow:

Q. Just a minute: From meeting competition, you were considering quoting the mill price in that instance, weren't you?

A. Yes.

Trial Examiner Norwood: Quoting such mill price as would meet the competition at the destination; is that what you were trying to do?

The Witness: That is about the story, yes.

37900 By Mr. Withrow:

Q. I want to ask this, Mr. Letzkus: Were you quoting one mill for all destinations, or different mill prices for—

A. We did not quote any.

Q. Were you considering that $1.50 was a mill price for all destinations?

A. Yes, sir; was trying to determine about how far this was to determine how far the $1.50, at our plant, would carry, and not get beyond a price that probably somebody else would quote from their mill.

37901 Q. Now, I do not know whether I have asked you this or not, but did you not quote in this instance because of any agreement or combination you had with your competitors?

A. Absolutely not.

37904 Q. That is all I want. I think that is clear without taking any more time.

I show you Respondents' Exhibit 2883, and I will ask you if you dictated that memorandum?

37905 A. Yes, sir.

Mr. Withrow: Your Honor, I offer in evidence Respondents' Exhibit 2883.

Trial Examiner Norwood: What use was made of it?

Mr. Withrow: Of what?

Trial Examiner Norwood: Of the memorandum?

Mr. Withrow: It is a letter to the Federal Government, Your Honor.

Trial Examiner Norwood: Oh,

Mr. MacIntyre: This is objected to as incompetent, irrelevant and immaterial. It goes to a matter about which the Respondents have been attempting to put in evidence of a transaction post dating the complaint for the past three weeks, and about which the Commission put nothing in.

Trial Examiner Norwood: This does not relate to that Good Friday bid, will it?

Mr. Withrow: No, Your Honor.

Trial Examiner Norwood: The objection is sustained.

37909 Trial Examiner Norwood: Let us close the discussion.

Mr. MacIntyre: This is on another point, if Your Honor please.

I want the record to show at this point that I am serving notice on behalf of the Commission on Respondents' Counsel that we do not expect for them to destroy or otherwise misplace this exhibit which has just been rejected, but we want them to stand ready to produce it when and

if the Commission and the courts call upon them to produce it. I want the record to show that.

37911 Q. Mr. Letzkus, I show you Commission's Exhibit 178-A, and ask you if you recall bidding on this Tygart River Reservoir, or Dam?

A. Yes, sir; we did.

Q. Do you know—could you tell us where you secured the price which you bid that $1.85 f. o. b. Grafton, W. Va.?

A. This was during the time—

37912 A. (Continuing) —of the existence of the Code Authority, and the price came from the Code Authority.

By Mr. Withrow:

Q. That was the price filed with the Code Authority?

A. Yes.

Q. Would the same apply to the $1.70 which you bid on the specifications for the Tygart Dam, as shown in Commission's Exhibit 178-B?

A. Yes, sir.

Q. And could you tell us, if you recall, how these prices of $1.84 and $1.70 compared with your commercial prices of Grafton, W. Va.?

A. Well, let's see. The first price, I believe, was 20 cents under the commercial, or so-called current going price at that time, and then that bid was thrown out; and then there was another price filed, and that was 7 cents lower, and that was thrown out, and another price filed, and an additional 7 cents, and that is the one that seemed to take; so it was really 34 cents, finally, under the current commercial price at point of delivery, whatever it is.

37913 Q. Now, I call your attention, Mr. Letzkus, to Commission's Exhibit 178-C, and I would like to direct your attention to the information contained in column 6 opposite "F" and "G." Do you find that?

A. Column 6? Yes; that is supposed to be the capacity of the plant. And what is the other one?

Q. "G," Maximum.

A. One is average and the other is the maximum.

Q. Well, could you explain to us how this figure of 1,500,000 barrels was arrived at, if you know?

A. Well, that is lower than it should be, and the maximum is higher than it should be now, so I suppose we just —our present capacity is 1,875,000 barrels. This was back quite a little ways, and we put in an average of 1,500,000.

I do not know what you would exactly call an average. We just put that figure in as being reasonable safe, and an accurate count, 2,150,000 is the maximum. Now, at that time we had operated for a 30-day period, and at the rate we were going we could have made 2,150,000 barrels, but I do not think that is entirely fair to take that figure now, because I do not believe that you can operate a cement plant for 12 months at that maximum rate, so we are using the 1,875,000.

Q. That 1,875,000 is what you feel you can produce today?

A. Yes.

Q. And those figures on Commission's Exhibit
37914 178-C have no other significance?

A. No; absolutely none.

Q. Do you recall the bidding on the Muskingum Dam in Ohio?

A. Oh, yes, in a kind of a way.

Q. And when was that?

A. Well, that was along about that same time.

Q. By the "same time," what do you mean?

A. As the Tygart Dam in—and I remember that we put in a bid on that at the commercial or current going price at that time, and I guess it must have been immediately before that that the first bids on Tygart were opened, and they were thrown out, so I rather figured that our price was going to be thrown out, and I was not wrong. It was thrown out, too. And we reduced our price, then, 20 cents comparable to that price on the Tygart Dam, and put in that of—didn't know whether it was going to be thrown out or not, but made up my mind that is the price I wanted, and I was not going to reduce the price any more, and fortunately they awarded the contract on that basis, and we got a substantial part of it, and I think one or two or three other firms got some.

Q. Now, this Tygart, Muskingum Valley, Muskingum Dam, these are two instances where you have bid less than your current destination prices; is that correct?

A. Yes.

Q. And your usual practice, however, is as you
37915 said in the stipulation, bidding the going commercial price; is that correct?

A. Yes, we have bid to meet competitive conditions.

37924 Q. Mr. Letzkus, I show you Respondents' Exhibit 2885-A to I, and ask you if that is your file and bid to the United States Industrial Reformatory at Chillicothe, Ohio?

A. Yes, sir; it is.

37926 (RESP. EX. 2885-A to 2885-I, was offered and received in evidence.)

By Mr. Withrow:

Q. Mr. Letzkus, I will show you Commission's Exhibit 1089, and ask you if you recall the invitation to bid and the bid which you submitted on an inquiry of the research division of the Soil Conservation Service?

A. Yes. We bid on that.

Q. Now, it shows—indicates there that you did not put in a bid f. o. b. bidder's shipping point; is that correct?

A. Yes.

Q. And could you tell us if there are any land-grant rates or special rates between your mill at Fultonham and Fresno, Ohio?

A. No.

Q. Now, Mr. Letzkus, the Commission offered in evidence a number of tabulations of bids to the Indiana
37927 State Highway Commission back in 1929, through 1933. Do you recall your bids to the Indiana State Highway Commission?

A. I do not recall the different bids. We did bid back in there, and I think once we got a small order; I do not recall how much we shipped of it. It was, as I recollect, it was destination price, although at one other time in our efforts to try and get in there we did quote a price f. o. b. the mill, and I do not think anything ever came from it.

Q. Now, these tabulations indicate that you did not bid at all destinations in the State of Indiana. Could you tell us your reasons for not bidding at all of the destinations?

A. Well, that is in these papers. I would judge that the reason was the amount of money we would get out of it; the mill net was too low, because Indiana is getting over a ways from our plant.

Q. Well, I will call your attention specifically to the bid you made on March 23, 1933, and ask you if the reason you have just given there is the reason which applies in that instance.

A. We submitted a bid at certain points and
37928 for a quantity not to exceed 50,000 barrels, and we only picked out certain points, and while it does not show in this bid, the mill nets, it would on our office copy; I am certain it was due to the fact that these points,—the mill nets we got out of it,—was satisfactory, the others were not. So I picked the best ones and quoted for that delivery only instead of the whole collection of towns that they showed in here.

By Mr. Withrow:

Q. Now, was this selection of towns the result in any way of any agreement with your competitors?

A. No, sir; it was entirely on our calculations and figures.

Q. And was your selection of the amount in that instance, 50,000 barrels, the result in any way of an agreement with your competitors?

A. No, sir.

Q. And if you can, to save some time, would that testimony as to agreement as to towns you picked out, and as to activities, apply to the other bids you made to the State of Indiana?

A. Yes; I would say yes.

37931 Q. Mr. Letzkus, I show you Respondents' Exhibit 2887, and ask you if this was a memorandum prepared under your supervision?

A. Yes, sir.

(RESP. EX. 2887, was offered and received in evidence.)

37932 Q. Mr. Letzkus, I show you Commission's Exhibit 14,—I guess it is 14-A and B, and ask you if you recall having made a bid to the Commonwealth of Pennsylvania, Department of Property and Supplies?

A. Yes, sir; we did.

The witness identified Resp. Ex. 288-A-C as a bid which Pittsburgh submitted, dated May 26, 1937, referred to in Com. Ex. 14. That is his signature on the bottom of the bid.

Q. Now, I notice here that you did not bid at all the destinations at which bids were requested. Would you tell us your reasons for not bidding all the destinations?

A. Low mill net as the result of the high freight rate to these distant points. We picked out the points where we would get a satisfactory mill net out of it.

37933 (RESP. EX. 2888-A to 2888-C, was offered and received in evidence.)

37934 By Mr. Withrow:

Q. Mr. Letzkus, I show you Respondents' Exhibit 2889-A and B, and ask you if that is a carbon copy of the bid which you submitted to the Commonwealth of Pennsylvania, Department of Property and Supplies, in April, 1936?

A. Yes.

Q. Is that the bid referred to in Commission's Exhibit 15-B?

A. Yes, sir.

37935 (COM. EX. 2889-A and B was offered and received in evidence.)

By Mr. Withrow:

Q. Now, Mr. Letzkus, in determining whether you will quote a sale to somebody as a dealer, do you take into consideration the question of whether or not he is a member of a building supply dealers' association?

A. No, sir; we do not.

Q. Have you ever been told by dealer organizations what dealers you should sell and what dealers you should not sell?

A. Not directly. They have a good many years back—they used to complain. You could hear from individual dealers, but we use our own judgment, and we decided, ourselves, whether or not we would sell them regardless of dealers' associations or individual dealers, in most cases.

Q. And do you sell dealers, if you know, some of your dealers who are not members of building supply dealers' associations?

A. I presume we do. I do not ask them whether they are members or not. That is no concern to us.

37939 Q. Mr. Letzkus, I ask you to look at Commission's Exhibit 1020-B, and see if the letter purporting to be written by you—I will ask you if you are familiar with that transaction?

A. Well, this is a letter that I wrote the Code Authority. It entirely slipped my memory. This indicates, however, that I wrote the letter.

Q. Now, the meeting that is referred to there, was that a meeting of the Code Authority?

A. Yes, I judge so.

Q. Now, would you tell us whether or not any agreement was reached at that meeting as to the amount of dealer markup which you or your competitors should quote on selling contractors?

A. Well, I do not think so. It looks as if I brought up the subject, but nothing ever came of it, and it was during the Code period.

Q. Now, do you recall that sale to—that quotation that you have referred to there?

A. No, sir.

Q. That 15-cent mark-up?

A. No, I do not remember it. It looks to me as if it was purely a case of operating under the Code, and these matters of placing orders through dealers would
37940 come up and the logical place to ask for information would be from the Code Authority.

Q. Have you ever had any agreement with cement manufacturers as to what the mark-up should be?

A. No, sir.

Q. Now, would you tell us whether or not in some instances the contractors asked you to obtain from the dealer the dealer's price?

A. Yes, they do.

Q. Now, do you recall, Mr. Letzkus, having issued an announcement of sales policy around February, 1935?

A. Yes, sir.

Q. And is Commission's Exhibit 1933 the announcement which you sent out at that time?

A. Yes, sir.

Q. Now, did you ever send out an announcement subsequent to that time?

A. I do not know whether this is the last one; I believe we did have two. I do not know whether this is the last one or the first one.

Q. Well, I show you Commission's Exhibit 1934. Is that the other announcement you referred to?

A. Yes, sir. This is the second.

Q. Now, would you tell me the circumstances surrounding your announcement in February, 1935, why you made an announcement at that time?

37941 A. Well, competitors sent out these announcements to dealers, and we naturally picked some of them up, and so in order to let our customers know where we stood we issued our own policy, and this was the result.

Q. Now, did you issue that February policy as the result of any agreement with your competitors?

A. No.

Q. Now, would you tell us the circumstances under which you issued your policy in April, 1935?

A. We made some few minor changes in the things here, and I don't know just what brought it about.

Q. Did you issue it as the result of any agreement or combination with your competitors?

A. No, sir.

Q. Now, do those represent the last instances where you have written and broadcasted to the trade your sales policies?

A. Yes, sir.

Q. And have you made any modifications in
37942 actual practice from those policies?

A. Oh, this is the policy, but there probably might be instances of slight deviations, not of any consequence, though. The general policy is still in effect, as is.

37943 Q. Would you tell us, Mr. Letzkus, why you sold W.P.A. direct? I mean, through dealers prior to June 1, 1937?

A. Well, prior to that time the inquiries were not so big as they were in later years, and, really, I felt that most of that tonnage was dealer business being possibly delivered by trucking otherwise, and then there reached a period where a good many of these dealers I found were quoting prices that were as low as we were quoting the dealer, indicating that the dealer, instead of doing business for nothing, was getting special prices, and it seemed to get worse, so I reached a point where I decided that the best thing to do was just to take all carload stuff the W.P.A. asked for and quote it direct, so we started that.

37944 Q. Don't go any further, if that is subsequent to July 1, 1937, Mr. Letzkus.

Was your selling W.P.A. through a dealer prior to July 1, 1937, the result of any agreement with your competitors not to sell them direct?

A. No, sir.

Q. Do you recall, Mr. Letzkus, what position your dealers took with you with reference to sales to the W.P.A.?

A. Do you mean selling direct?
Q. Yes.
A. Their attitude?
Q. Yes.
A. Well, they did not like it.
Q. And did they complain to you about it?
A. Yes.

37946 Now, Mr. Letzkus, do you enter into specific job contracts with your customers?

A. Yes, sir.
Q. And does that protect them in the event of an increase in price?
A. Yes. We quote them our current price at the time, shortly before they are going to bid, and that quotation is held open until the bids are taken, and then in due course we expect the fellow to give us the order, if he is going to give it to us, and the order is written up for the amount of Portland cement required for that particular job, and will be shipped at that current price until the job for which it is sold has been completed, and usually that is a year, sometimes it may run a little over, but usually a year or less.

37947 Q. Now, what happens to that contract in the event of a decline in price?

Trial Examiner Norwood: Now, we have covered this. This is evidence of a general issue there, a general subject, and we have covered it so many times, and it has been explained to us, and there is no controversy about it whatsoever, so I suggest we eliminate any further questions about it unless there is something in particular you want to bring out here that is peculiar to this Respondent.

Mr. Withrow: Well, I want to bring out through this Respondent, and have it manifestly clear on the record, and I offer to prove through this Respondent that in the event of a decline in price this Respondent has not been able to hold a purchaser to a specific job contract, and that as a result of the practice of entering into specific job contracts, this company is unable to secure the benefits of increased prices on a substantial proportion of its sales and shipments of cement until some time subsequent to the time its price quotations have become effective.

Mr. McIntyre: We are not asking that he be compelled to enter into such contracts, therefore it is not an issue.

Trial Examiner Norwood: I think that whole
37948 situation regarding those contracts is perfectly clear on the record, and there is nothing about it that is going to be controverted in the slightest.

The witness identified Resp. Ex. 2891-A as a letter to Pittsburgh salesmen; Resp. Ex. 2891-B as a memorandum from "our" traffic clerk down at the cement plant; Resp. Ex. 2891-C as a copy of a letter sent out to all of "our" salesmen. A receipt stamp on Resp. Ex. 2891-D was put on upon receipt in his office. Pennington, who purported
to have signed it, is a salesman of "ours" down in
37949 West Virginia. Resp. Ex. 2891-F is a report to the witness. The same as he has applied to "letter" applies to Resp. Ex. 2891-G. The witness identified Resp. Ex. 2891-H as a report made to him; Walker is one of "our" salesmen in Columbus; Resp. Ex. 2891-J as another report from the same salesman to the witness; Resp. Ex. 2891-I as a memorandum to Mr. Walker. That is Pittsburgh's stamp on Resp. Ex. 2891-K, the receipt of the mail in his office. The witness identified Resp. Ex. 2891-L as his memorandum to his salesmen. These memoranda were sent and received in the regular course of doing business.

37953 Trial Examiner Norwood: When you get information direct as to a freight change, do you use that immediately in the pricing without waiting to get the correction from the Institute?

The Witness: We get information from the field pertaining to a freight change; the chances are we discuss it with our traffic department, but any kind of information, Your Honor, that we pick up that is of value to us either in quotations to customers, or freight, or anything pertaining to our successful handling of the sales end of the company, I want my men to send it to me.

Trial Examiner Norwood: I just want to know this,
would you use that freight rate in your pricing prior
37954 to receiving the correction from the Institute?

The Witness: We do not pay any attention to the Institute correction, Your Honor. That would go to our traffic department. If they approve it and O. K. it, and granted us the authority to use it, we would go ahead.

Trial Examiner Norwood: You would use it before you found out that anyone else was using it?

The Witness: Oh, yes, as soon as our own traffic department approved the use of it.

37953 By Mr. Withrow:

Q. Just one question, Mr. Letzkus: In talks answering the Examiner, does the receipt by your traffic department of the correction sheets from the Institute, does that determine whether or not they will approve a rate which you use?

A. No. Not to my knowledge.

37962 New York, N. Y.,
Thursday, May 2, 1940.

37963 (RESP. EX. 2891-A to 2891-L was offered and received in evidence.)

37964 L. C. LETZKUS thereupon resumed the stand and testified further as follows:

Cross-Examination by Mr. Paulson.

Q. Mr. Letzkus, when was it you began selling cement for the Pittsburgh Plate Glass Company?

A. January 1, 1925.

Q. Your position, then, was what?

A. Sales manager.

37965 Q. Is that your present position?

A. Yes.

Q. Are the affairs of the Columbia Division managed by the division itself, or, by the Pittsburgh Plate Glass Company?

A. Everything pertaining to sales and quotations, matters of that kind, I handle all that under my supervision.

Q. Well, important matters of policy, are they decided by—

A. I decide them.

Q. What is that?

A. I decide that, too.

Q. Have you the power and authority to alter your price structure at will?

A. Yes, sir.

Q. You would not have to take that up with any of your superior officers?

A. Well, I, naturally, in an organization like ours, if it

was something unusually important I would probably go and talk it over with the president of our company.

Q. Who is he?

A. That is H. S. Wherrett.

Q. How do you spell that Wherrett?

A. W-h-e-r-r-e-t-t.

Q. For instance, if you wanted to switch over to f.o.b. mill selling exclusively, would you consult with Wherrett?

A. I would possibly go to him and tell him I
37966 thought I would do that, and he would say, "Well, if you think that is the right thing to do, that is satisfactory to me."

Q. But you would have a discussion with him on that?

A. Yes, just more for counsel and advice than anything else.

Now, you understand that any unusual departure from what we would consider more or less routine running the business; why, I would discuss those things with him. Now, to give you a clearer picture, perhaps, I might not even talk to him; we are both in the same building on different floors; I may not even talk with him for two or three months unless something unusual came up.

Q. Well, I asked you as to price, pricing cement for your company. Do I understand, and you correct me if this is wrong, that it is the normal thing for you to determine destination prices by adding freight to a so-called base point?

A. That is correct.

Q. And for how long has that been your practice?

A. Oh, ever since I have been with the company. Now, if you go beyond that back in the early years when I was with Universal, I do not recall even, they had a different arrangement over there, but more or less along the same lines; of course, I was not in the position there that I am here.

Q. Has the Pittsburgh Plate Glass Company's Cement Division always obtained its freight rates from the Pitts-
burgh Plate Glass Company?

37967 A. Yes, sir.

Q. Have you ever made a personal study of the freight department of the Pittsburgh Plate Glass Company?

A. No.

Q. Is it your practice to call them, do I understand, when you want a rate?

A. Yes.

Q. And you accept the rate that the traffic man sends to you?

A. Yes. Perhaps I can make that clearer: Suppose you call me today and ask me the price on cement at some given point. I look in the freight book that I think you saw. It isn't in it. I simply take the phone and call up the freight department and say, "Give me the freight rate to such and such point," and in due course they would call me back.

Q. And I believe you said you thought they obtained the rates from the tariffs?

A. Yes, I have been told by those in the traffic department.

Q. I want to see whether I am correct. You do not know, as a matter of personal knowledge, whether they also have the freight rate Institute service available?

A. Well, they do not have it in this sense. I took it upon myself to ask them. Now, as I understand it, The Cement Institute charges a certain amount for the freight service. Now, we do not pay that, so that ought to
37968 be a rather definite evidence we do not; they do not give you anything for nothing.

Q. It is shown by one of the exhibits that was offered by Mr. Withrow that correction sheets, issued by the Institute to its freight rate book, was in your possession. I am asking you whether or not you know of your own knowledge whether the traffic department of the Pittsburgh Plate Glass Company has available the freight rate books
37969 —that is of your own knowledge, you understand, Mr. Letzkus?

A. Well, I can say this, that they have some freight rate books. Now, how many I do not know, but as a matter of fact I had one in my office to see what it looked like, and then threw it away or passed it on somewhere, I do not know where it went to.

Q. That is, you had a Cement Institute freight rate book in your office?

A. Just to look at it; to see what it looked like; somebody brought one around.

Q. Well, then, you spoke of the fact that the Pittsburgh Plate Glass Company's traffic department had freight rate books. You had in mind the Institute's freight rate books there, did you?

A. I figured that they had some, just like I would have one, see, to get some idea what it is. I take it from—May I continue? I take it that what you want to know, trying to get out, I testified here that we do not use the Institute freight rate books to figure our price.

Now, I do not know whether you gentlemen doubt that, my word on it, or not, but if that is the basis of the thing, I want to reiterate that as far as the sales end is concerned, we do no use them.

Now, the freight book that we have is an entirely different thing, and it is given to us by our traffic depart-
37970 ment, and my association with the traffic department is such as calling up or going up, I know them all, but I will go in and argue with them on a freight point some place, and in the course of these conversations I would see them pick out the tariff. I have had them to say to me, "Wait until I get the tariff and see."

Now, that is only the regular thing in the course of business, because part of my job is to get the lowest freight rate from our plant to any given point.

Q. Yes. When they dug out the tariff from the railroad tariff, did they also look at the Institute books once in a while?

A. I never, to my knowledge, saw an Institute book, actually saw it; never saw them use any, but when I would be there they would get out these railroad tariffs and go busting through those to get what they want.

Q. What was it that caused you to go into the traffic department and ask in detail about those rates?

A. Oh, that is just in the regular course of our business.

Q. Would it come up in connection with some bid that had been made, some letting?

A. Not necessarily. I might at any time go up if I take a notion.

Q. Well, why would you go into the traffic department?

37971 A. Well, I tried to make this thing a little clear.

Q. I mean, what interest is it to have the correct freight rate as a sales manager? What do you care about the correct freight rate?

A. It is every interest in the world.

Q. Why?

A. If I can get a larger mill net at my plant— You see, my job and my position all have to do with my making

money in my division. Now, if I look at the freight rate to any given point, and I think that rate is too high, gauging it on distance, or something of that kind—now, I am just taking a notion that I think that is too high—and I would probably go up and see Mr. Sevin, or one of his assistants, and say, "Here brother, this freight rate is too high. I do not think it ought to be that high." Now, maybe I do not expect to get anything, but you are
39772 going after those things all the time, and it is of interest to me.

Q. I cannot understand what the sales manager should be interested in whether or not the company quotes the correct freight rate or not.

A. The best I can say to that, Mr. Paulson, you have never been in business, have you, selling—buying and selling?

37973 Q. I understand you to say, earlier, that you sold on the basis of so-called base plus freight?

A. Yes.

Q. That is correct?

A. Yes.

Q. And have you found that your competitors do likewise?

A. Yes, I suppose they do. They—

Q. And then wouldn't it follow, if you were going to be as low as they, you would have to use the same freight rate as they? "Yes," or "No," Mr. Letzkus?

A. Yes.

Mr. Withrow: Your honor—

A. Yes.

By Mr. Paulson:

Q. If you used a higher freight rate you would be out of competition, to use your language, wouldn't you? Isn't that why you go to the freight department and check up once in a while?

A. No. You have got the wrong idea on this thing. I am talking about our freight. Now, I think I understand what you mean. You are talking about a freight rate on which the price is based; is that correct?

Q. Yes.

A. Well, I am talking about our own freight rate; that if the freight rate from our point, or from our mill to
37974 the other point can be lowered by me, through my

efforts, a nickel, a penny, or anything else, we make more money on it.

Q. You have no base point at Fultonham?

A. That is quite true.

Q. As a sales manager, you do not care anything about freight rates from your mill to destination points, do you, in making the price? You want to know the freight rates from the other basing points, from the so-called basing points to destination?

A. Oh, I certainly must have it from my own.

Q. Why does a sales manager have to have it from his own?

A. Well, can I give you an example?

Q. Yes.

A. Now, we have run around Pittsburgh, and we found out what prices are being quoted there generally. We take that delivery price and we strip it of the bag and the freight rate from the local plant, and we find out what mill net they are using at their plant. Now, that price is all around, 15 or 20 or 30 dealers, or— So obviously I have got to quote that same price if I want to get—

Q. Now, you want to know the freight rate—

Mr. Withrow: Let him finish.

The Witness: Let me finish.

Mr. Paulson: Yes.

Trial Examiner Norwood: Let him finish the answer.

37975 A. I am going pretty good here. I think I will make it clear to you.

Now, I have got prices. I am going to quote, to put us in line with what everybody else is quoting. Now, I look at my own freight, how much will it cost me to get in here. It is going to cost me as it happens to be 49 cents, and if I can get—if it is possible that there has been an error, or if there is any unfairness in that rate, and I can induce our traffic department to take it up with the Interstate Commerce Commission and prove to them that they were in error, and they reduce that freight rate from 49 cents to 44 cents, then I make a nickel, a nickel a barrel more on the cement, but it does not change the price.

By Mr. Paulson:

Q. You help the traffic department, do part of the work for the traffic department?

A. Well, I would not call that helping them. It is just natural alertness.

Q. But isn't it true you must have the same rate as your competitor from the so-called base to the various destination points if you are to make prices identical with theirs?

A. Well, we have had some.

Q. Well, isn't it true, "yes" or "no"?

A. Well, I do not need to have their freight rate to make a price.

37976 Q. You have to have a freight rate that is equivalent, equal to theirs?

A. I can go to our card system there and see what the price is in Pittsburgh or Cleveland.

Trial Examiner Norwood: In case you do not know the price, do you have to have the freight?

The Witness: I do have it and have it in my freight book, and could get it right there, yes.

Trial Examiner Norwood: If it is a new point that you haven't in your book, can you use the freight in figuring their price?

The Witness: Yes, if I knew the mill net that these local mills are getting.

By Mr. Paulson:

Q. Well, you exercise care, do you not, Mr. Letzkus, to see that you do not use a freight rate which your competitors are not using?

A. I do not know what the competitors are using.

Q. You do not know what freight rate your competitors are using?

A. No.

Q. You have been in the cement business in that territory for 25 years, or, I mean, for 15 years?

A. Now, you are asking me a definite question. I have no way of knowing what the other fellow is using.

39977 Q. Don't you know they used The Cement Institute freight rate books?

A. I have heard it said.

Q. Don't you know it, as a matter of personal knowledge?

A. Only—the best evidence I have of that is from the testimony that I have read from time to time here.

Q. That is in the 15 years that you have been sales manager for Pittsburgh Plate Glass Company's Cement

Division you did not know that your competitors use the Cement Institute freight rate books in figuring prices?

A. Well, Mr. Paulson, I would have to say no to that, because you demand such a very—

Q. Did you have any indications that that was the case?

A. Well, I think that several of them use it.

Q. What made you think so?

A. Oh, I cannot—

Q. What made you think so?

A. Just because they are certainly not going to run a traffic department in this Institute if somebody does not use the book.

Q. That is the only indication you had that any of your competitors use them.

A. I never—I never saw an Institute book in the hands of any of our competitors, and I do not believe that any competitor ever told me that he was using it. Now, I, as a matter of fact, I had no idea that so many competitors did use it until I would read some of the testimony that 37978 has been given by different companies here at these various hearings.

Q. Do you have an opinion, or knowledge as to how they did figure their freight rates?

A. Well, I would assume if they were not using those Institute books, they would have to get it from the railroads, from the tariffs. This is the only source I know of from which you can get it.

Q. Did you ever hire a salesman who had been working for one of your competitors?

A. Yes, two of them.

Q. Did he tell you whether or not he had used Institute freight rate books?

A. No, sir.

Q. He did not tell you that?

A. No.

Q. Do you give your salesmen your freight rate books?

A. Yes, sir.

Q. They carry them?

A. Yes, sir.

Q. It is necessary in your company to have your salesmen carry your freight rate books, is it?

A. We think so. We think they should have them as part of the equipment.

Q. Do you have any knowledge as to what freight rate books your competitors' salesmen carry?

37979 A. No, sir. Again I can say that I never saw a freight rate book of any of our competitors. Now, I am going back to the time with this company. If you go back 25 or 30 years I do not know what happened then.

Q. In other words, you learned something when you read the record in this case; you learned the Institute published freight rate books, and that they were used by your fellow members of the Institute; is that correct?

A. Oh, no. I did not learn the fact that they had these books. I knew that.

Q. Oh, you knew that?

A. Certainly I knew that.

Q. Where did you learn that?

A. I presume I heard that at an Institute meeting, or something.

Q. Oh, you have attended some Institute meetings, have you?

A. Yes.

Q. By the way, why did you join The Cement Institute, Mr. Letzkus?

A. I think—didn't I put that in my tabulation?

Q. Well, I believe you did. I will ask you something in more detail on that.

You say in Commission's Exhibit 139-M, which I will show you, that "I think I need not again remind you of the fact that we are in accord with the Institute and its
37980 purposes and fully believe that it will do a lot of good, but to accomplish this good we must have all of these companies in."

What good would the Institute do your company (handing a paper to the witness)?

A. Certain statistics that they send out, that is some help to me, and back in the Code days when they were checking contracts, that was of big value to me, and saved us undoubtedly a lot of work, and effort and money, and that was one of the things that I liked best of all, because in going around following the job, where there are four, or five, or six or eight or ten other cement companies, one of them may get the order closed up. Then, or during the Code period, we would know that promptly. I have known of cases where some of our men have followed jobs for two months after they had been placed, and that was a very big help to us, and the checking of contracts at that time was another thing. Those were the two outstanding things that were helpful to me. Now—

Q. What is the longest period of time over which you make delivery under a specific job contract?

A. I cannot tell you that, Mr. Paulson.

Q. What is the average time?

A. Well, what we do is this—

Q. Can you give me the average time?

A. Oh, well, say, a year, if you don't want to be very explicit.

37981 Q. No, for the purpose of that question.

A. Some jobs may run for two years, but not very often.

Q. Under contract checking by the Institute, was that time shorter or longer than when you did not have contract checking?

A. Do you mean the period of the expiration of the contract we would enter into?

Q. The period of deliveries under contract.

A. No, I do not know that there was ever any change.

Q. That did not affect the length of time?

A. No, regardless of Code, or anything else, when we sell a job we endeavor to find out from the contractor how long it is going to take him to finish the job, and we feel that we are obliged, then, if we take the order covered at that price at which we sell him until he finishes the job, because frequently—

Q. Yes. Well, I don't mean to cut you off in the middle of the sentence.

A. That is all right.

37983 Q. Mr. Letzkus, how long does it normally take for an announced price increase to stick, or to fail to stick; in other words, what is the period in there?

A. Oh, I don't know that there is any definite period. You mean if the price—somebody advances the

37984 price; is that what you mean?

Q. Yes.

A. And then whether the other fellow is going to follow it? I do not think there is any stated period. I know this, that in our case I would probably wait two or three days, maybe four; it would not be the same any particular time, depending upon the mood I was in and the general conditions, and if I found through the reports sent in by my salesmen that most of the competitive companies in the areas in which we operate had raised their price, and if I needed an advance in price to get a little more money out of the cement, I might try to help the thing along, send ours

up, try to get that extra money, too. Now, if one fellow sent out a quotation and after two or three days our salesmen report that they found no other quotations by any other company following that advance, why, it would look rather hopeless, then, to me, because we would have to keep—even if one or two companies do not make the advance, well, you are going to be out of the picture if those companies are shipping right in your own area because you cannot get the higher price then, and I would just naturally have to sell for what the other fellows do.

Q. Now, about what percent of your yearly out-
37985 put is under specific job contract at all times?

A. That varies greatly. If you want just an average, I might make a guess at it, but it would not be anything that you could tie to very closely because we have had years when our—what we call our warehouse business—has been a great deal higher than other years, and we would find out that much of the cement that those dealers were taking was for specific jobs for which they had never contracted with the cement company.

Q. Yes, but how much cement do you have under specific job contracts at any one time, a fair average?

A. Oh, I would say—do you want it in barrels?

Q. Yes.

A. Or percentage, or how?

Q. In barrels. We know your production figures.

A. Well, I would think that the best way I could make that clear to you, to say right now we have about 400,000 barrels on the books for which—

Q. Out of that 400,000 that is on the books, about how much do you expect to deliver under those contracts?

A. I think that if I get—if I deliver 90 to 95 percent I will be pretty well pleased.

Q. You do expect to deliver as much as 90 or 95 percent?

A. Yes; and again I might say that that is not always
a dependable thing in clearing up your situation here,
37986 because you never know. We figure out—this is from actual experience—we try to estimate about how much cement a job will take, and then we try to conform that with the contractor. If it is sufficiently important, we may go to the engineer on the job, and in that way can keep fairly cl e—

Q. Does your company check its specific job contracts in the daily run of its business to see that they are not being abused?

A. At intervals our salesmen have—the moment we put a contract on the books he gets what we c[illegible] a job sheet, supposed to put that among his papers, and then at regular intervals, as he goes around, and gets near that job, to check it, to see what is going on, and let us know.

Q. You have a very close check, then, on duplication, do you?

A. We try to.

Q. You do have,—from your experience, you would say you do have?

A. I would say that would be close if they always do it, but salesmen don't always do it.

Q. Was there a tendency on the part of your contractees, whom I suppose were dealers, to take more cement than they were entitled to under specific job contracts?

A. Yes.

37988 Q. Reverting back to the advance in price proposition, Mr. Lutzkus, on direct you said that you had a rumor about the advance at Cleveland in January;
37989 1936. Do you recall?

A. 1936? I think that is the occasion when a salesman, our salesman in Cleveland, called up on the phone.

Q. Did he tell you where he got his information?

A. I think we had that paper here, showing that he got it from dealers.

Q. Do you frequently get rumors from your salesmen as to price advances?

A. No, not frequently, but we do get them at times.

Q. Well, do you know of any other instance than the one at Cleveland where the rumor has proved to be true?

A. No, just at the moment I could not think of any case, but to clear that position, a salesman may call me up at any time, and on any matter, and he may say,—to put it this way,—"By the way, I was talking to so and so," some dealer, "and he said he understands there is going to be a decline in price or prices are going to pieces, or prices are going up. Now, if he picks up anything like that he would naturally pass it on to me for what it is worth, and most of them—

Q. Yes, I understand. But I want to find out, I will ask you again if you recollect now any other instance than the Cleveland instance where a rumor proved true, a rumor of price advance proved to be true?

A. No, I cannot recall any case, to answer your question.

37990 Trial Examiner Norwood: Can you tell me why, if you know, that a dealer who is buying cement wants to notify you or your salesmen that one of your competitors has advanced the price?

The Witness: Why they do it?

Trial Examiner Norwood: Yes. Why would they do it?

The Witness: I haven't the remotest idea why they would do it, but I do know this, that if I were a salesman, and I called on you, and you are a building supply dealer, Your Honor, I would try to get all the information I could, and perhaps I may know you very well, and possibly had bought you meals, and so on, and we are very close friends, and if you had any information that you think might be helpful to me without injuring yourself you might tell me, or I might pull it out of you in the course of the conversation. Now, that is all part of salesmanship, particularly in the cement industry.

Trial Examiner Norwood: Go ahead.

By Mr. Paulson:

Q. What things did you take into consideration in deciding whether to follow the advance in Cleveland in January, 1936?

37991 A. I would not know how the ramifications of my mind were at that time. I would say that if there was an advance I certainly wanted to get the benefit of more money in the Cleveland market, because that is one place where we have not been able to get much business on account of the low prices that existed there, made our mill net low.

By Mr. Paulson:

Q. Do you recall whether you sent out quotations to a number of dealers?

A. That is usually our custom, and I would presume that we did in that case, but I do not know that without looking and checking up on it.

Q. How do you suppose rumors get started regarding price advances?

The Witness: Well, I do not know how they get
37992 started. I could theorize, but that is not factual.

By Mr. Paulson:

Q. Well, if you do not have any knowledge I will let the question go. Do you have any knowledge of it?

A. No.

Q. Were you the one that determined whether the Columbia Cement Division should join the Institute?

A. Yes, sir.

Q. Did you consult with any superior?

A. I rather think that I mentioned it to my superior. It would be probably one of those things that I mentioned to him.

Q. Do you find, Mr. Latzkus, that when you use your freight rate book in calculating delivered prices, you are generally able to make your prices at destination points identical with those of your competitor?

A. We do not ever know definitely that our prices are going to be identical, Mr. Paulson. We are hoping that they will not be higher than the other fellow.

Q. That does not quite answer it. I said, do you find generally that you are identical with your competitors?

A. In many cases, yes, but I cannot say always.

Q. Do you know of any instances where you have not been identical with your competitors?

A. Over the course of a year, over the course of several years there have been times when I found we were too high.

37903 Q. And have you studied the cases to find out why you were too high?

A. Well, just some other company quoting less than we were.

Q. Was it a freight rate differential that made the difference?

A. I do not know what made the difference. Now, sometimes somebody might make an arbitrary price, or whatever you choose to call it; that does not fit any pattern, and when we—

Q. And along that same line, you were telling us about the Tygart River bids, and you told us that the commercial price was first bid, and then subsequently a bid of 20 cents less was put in. Is that correct, so far?

A. No. The first price, Mr. Paulson, was—

Q. Was the filed price?

A. Yes. That was 20 cents below the so-called commercial or going price.

Q. I see.
Now the second bid was—
A. Seven cents.
Q. —seven cents less than the first bid?
A. That was 27 cents below.
Q. Commercial price?
A. Yes.
Q. Now, you said when you went to bid on the Columbia project, your used the last figure which you bid on Tygart—

37994 Mr. Withrow: Do you mean the Muskingum?

Mr. Paulson:

Q. Muskingum. Thank you.
A. Now, I worked a little different, if I can just think. We quoted—I am not entirely clear, but I think our quotation was figured on the commercial price, the same as anybody else would get, and if I recall correctly, the bids went in to Washington, and then before any decision was made the bids went in on Tygart, which were proportionately lower, and I felt that the chances are—at that time there was talk about a price down at this T.V.A. thing, I think Mr. Ickes or some of those fellows had a notion in his head that the maximum price ought to be a certain figure, I think it was $1.30, or something of that sort, so at any rate I felt then that with the Tygart price being at a lower range, I—that is, I think it was something either $1.30 or $1.35—I was fearful these fellows would come after us and say, "Here you have got to put your cement down or we won't buy it," or, "We will buy from the most distant point," or "Buy a cement plant and furnish our own cement."
Q. And you bid 27 cents?
A. No, 20.
Q. You bid 20 below the commercial?
A. Yes, we went down.—
Q. Why the twenty figure? How did you happen to to select twenty; why not twenty-five or

37995 thirty?

A. I don't know just what the reason was, but the Tygart thing was a Government proposition, and they went down to 20, and gave this—
Q. They went to 27, altogether, Tygart.
A. They went down to 34. There was another 7 after that.

Q. Why didn't you go down to 34 on Muskingum?

A. We wanted to get all the money we could out of the thing, and wanted our commercial price. I would not have gone down that 20 cents if I thought that there was any chance of the Government accepting the bids—

Q. What was the outcome? Were the bids identical on Muskingum?

A. What?

Q. Were the bids identical on Muskingum; do you recall?

A. I do not know whether they were or not.

Q. Did you get any business on that bid?

A. Yes, we had something like 100,000 barrels.

Q. Were you low, do you know?

A. I think Diamond got some of it.

Q. Several of you were identical?

A. Yes, and I think one of them—

Q. How do you explain that fact?

A. That was during the Code period.

Q. Was the price at Musingum filed with the
37996 Code Authority?

A. Oh, yes.

Q. You had filed your 20 cents below commercial?

A. Yes.

Q. Oh, I was wondering about that.

A. As a result of what happened over in this Tygart thing.

Q. I see. I got the wrong impression on direct, that you had not filed it. But you say you had filed it?

A. Yes.

Q. Were you the first one to file it, or did someone else file it?

A. That I cannot tell you. I imagine I might have been. I was very much interested, right close to our plant, and I was determined I was going to have some of that business if I could get it.

37999 Q. Mr. Letzkus, how did you happen to select November 29, 1931, as the date to announce that trucking privileges from your cement plant at East Fultonham would be discontinued?

A. November 31, did you say?

Q. November 29, 1931.

A. Well, were anxious to get—we were anxious to stop trucking because of a disadvantage to us, and as

soon as I found out anybody else was going to quit
38000 it, we were very willing to do so.

Q. Well, on what date did you receive your first notice that your competitors had discontinued trucking?

A. Well, I cannot tell you that. I do not have any papers to show when it was.

Q. Were you in Cleveland on or about November 27, 1931?

A. I do not recall.

Q. Do you recall registering at the Hotel Hollendon about that time?

A. I could not tell you definitely on that. I go to Cleveland frequently.

Q. Do you stay at the Hotel Hollendon?

A. I have not stayed there for a good many years. I go over at the Hotel Cleveland. At that time I might have gone to the Hollendon, but in recent years I always go to the Hotel Cleveland.

Q. Wasn't there a great deal of discussion among cement manufacturers along about the fall of 1931 regarding trucking?

A. I would not know that whether they discussed it or not.

Q. Wasn't that about the peak of the difficulties regarding trucking?

A. Well, I think that was the time when there was a great deal of trucking going on.

Q. Wasn't there a meeting at the Hotel Hollen-
38001 don along about November 27, 1931?

A. I would not know of any meeting.

Q. Well, did you attend any meeting?

A. Yes, one. I do not know whether you call it a meeting.

Now, I have one outstanding thing in my mind. I do not know just when it was, but it was a good many years ago. A dealer asked me to come to Cleveland, that he wanted to discuss some business matters—

Q. What dealer was that?

Mr. Withrow: Now let him finish his answer to the last question.

Trial Examiner Norwood: Let him finish.

A. I do not recall what dealer it was now. That was not an extraordinary request, and he told me he would meet me, that was the Hollendon Hotel. This kind of

stands out a little, I cannot remember the details, but I can give you enough, I think.

I went down there with the idea of meeting this dealer, had no idea what he had in mind, or anything else, went to the hotel and went into the room where I was supposed to meet him, and I was amazed to see several cement men sitting there. So right away I wondered what was up, and I tried to find out and nobody else seemed to knew, and after a little while,—this was in an adjoining room,—this dealer came out and invited me to go in. By that time I figured I had kind of been taken advantage of, so
38002 I was perfectly willing to face most anybody about then for a few minutes, so I went into this room and again to my amazement there was several dealers sitting around the room, and it was not a very pleasant meeting on my part because I was sore for having been, as I considered, double-crossed. Now, I was there, and those dealers, as I recall, well, they did all the talking. I just sat there and listened, and it had to do with trucking, and I fought back a little bit to a couple of them there, naturally, but I made no commitments and no agreements, and got out of there just as quickly as I could, and told them what I thought of them. Now, that is the whole gist of that thing.

By Mr. Paulson:

Q. Was it Mr. Holway or Mr. Campbell that notified you?

A. I do not know Mr. Campbell; without being able to mention any names, it seems to me—I know this, I was impressed when I looked around and saw these fellows sitting there, that they were the larger dealers that I knew all around; I do not remember how many there were; there might have been eight or ten or twelve of them. Now, I could not, you understand that much of our business is with dealers, and while you might be sore as a pup about having been put in that position, nevertheless I had to use my head a little bit because some of those fellows probably were buying our cement, but that was about the whole story of that particular meeting.

Q. Was Mr. MacQueen,—was there a Mr. Mac-
38003 Queen there?

A. I do not know whether MacQueen was there or not at that time.

Q. Do you recall whether Hollender was there?

A. Who?

Q. Holway, I mean.

A. Holway?

Q. Holway.

A. I do not want to say definitely that anyone was there.

Q. Do you know Mr. Holway?

A. Oh, I would say, he is one of our larger dealers. Yes, I know Holway, have known him for years. I know MacQueen.

Q. Was this meeting, can you recall, some time after Thanksgiving, 1931?

A. Well, somewhere around in about that time, but I cannot place the date at all. It would be just impossible.

Q. Will you tell us what manufacturers you recall were there?

A. I think maybe—I do not like to mention it because my memory is not clear on the point, but I think a Diamond fellow was there.

Q. Mr. Raff?

A. Perhaps; I do not know whether Dick Raff was there or not. I do not believe it was Dick, myself.

Q. Goldenboggen?

38004 A. Who?

Q. Goldenboggen, I believe he is a salesman.

A. Well, it seems to me it was kind of a district man, I do not think it was Raff, myself; I would like to name all those fellows for you if I could, but I cannot do it.

Q. Who else do you recall?

A. I do not recall the other fellows.

Q. Was King, of Universal-Atlas, there?

A. I do not think King was there. I do not remember him at all, and I knew King quite well because we used to work together.

Q. W. A. Davis?

A. I do not recall.

Q. Any of the representatives of your neighborhood plants there?

A. It seemed to me when I went in there at just first glance they appeared to be fellows from Ohio, miles around.

Q. That would be from—

A. Oh, well, there is Diamond, Castalia, at that time there was Castalia, and Standard, and those fellows, but I cannot visualize just which men were there, to be able to make an accurate reply.

Q. About how many cement men do you recall as having been there?

A. I would say offhand maybe five or six of them.

38005 Q. About how many dealers?

A. I do not know, anywhere between possibly five and twelve. I could not see very good when I got into that room. I was pretty much insensed about the thing, and I did not care much, but they were sitting all around, and I did not check up on them at all.

Q. Was this an evening meeting, or afternoon?

A. I think it was afternoon.

Q. Did you stay for the full session?

A. No, sir; no, sir.

Q. How long did you stay?

A. I do not know the time I was there, but I was not there very long.

Q. Possibly half an hour, or an hour?

A. Not over an hour.

Q. Who seemed to lead the discussion?

A. I do not know who the spokesman was. It seems to me that there were several of them talking at one time.

Q. Well, a moment ago I asked you how you happened to choose November 29th as the date to make your announcement. I show you Commission's Exhibit 2822, to refresh your memory as to that thing, if you will. Look at that, and I believe you will see that you made the announcement on that date.

A. Yes. That is my announcement.

Q. That is a photostat.

38006 A. Now, there was evidently some information came in to us from some of the salesmen that trucking was being discontinued, and as I remarked before I was opposed to trucking, and I would quit instantly if I felt I could do so without injuring our interests too much.

Q. You say evidently some information came in to you. Now, this is dated November 29th. You haven't fixed the date, but you say somewhere along in November. Do you recall whether it was before or after Thanksgiving?

A. I do not.

Q. Do you associate it with Thanksgiving in any way?

A. No.

Q. Was that your only business in Cleveland at that time?

A. I doubt it very much because I go to Cleveland quite frequently, and—

Q. Would you have in your files, or do you have in your files a letter containing the invitation to attend this meeting?

A. No, sir.

Q. Was the invitation by letter?

A. It probably was a telephone call.

Q. Do you recall whether it was a telephone call, or not?

A. As well as I can remember, it was a telephone call from some dealer. Now, I have been trying to remember who it was.

Q. Have you been able to remember the dealer yet?

A. No.

38007 Q. Did you leave immediately for the meeting, or was it on short notice—that is, do you recall?

A. I could not tell you.

Q. You do not recall whether the telephone call came in in the afternoon, for instance, and you went the next day down to Cleveland?

A. No; it was not like that.

Q. More notice than that?

A. I would say that I had more time because I do not think anybody would call me up to go to Cleveland, and I would jump up and run, because there isn't—particularly, just a matter of discussing some business, I would not do it, that is all.

Q. Is your memory clear on the point as to when the call—

A. No, not on that particular point, I cannot remember.

Q. Well, I call your attention to the fact that this is a photostat of a carbon. The testimony in the record is that this was picked up in the files of the Diamond Portland Cement Company, that is a carbon copy of a letter from your announcement, and it was picked up in the files of the Diamond Portland Cement Company. How do you explain it?

A. I have not the remotest idea in the world.

Q. Did you send a carbon copy to Diamond?

A. No, sir; we do not send carbon copies to our competitors.

Q. Well, do you recall a visit by the Diamond Portland Cement Company, or any of its representatives, to

38008 your office so that they could have picked up a copy?

A. No, I do not. But I would imagine that Raff, he and I are very good friends. While he has not been in our office for an awfully long time, I would feel offended

if he was up there and would not give me a call or drop in, or have lunch, or something of that sort. Now, this—

Q. Can you give us any explanation as to how that might have got in his files?

A. No, I have not the remotest idea how that got into their files. In fact, that looks to me as if it might have been to a salesman, or it might have been to a dealer.

Q. You did not send carbon copies of announcements to dealers, do you?

A. No.

Q. You printed that announcement, did you not?

A. Wait a minute. This is a carbon copy, isn't it?

Q. Yes.

A. Well, now, suppose he got hold of one that our salesman had and took it out and had this thing made up.

Q. Do you supply your salesmen with carbon copies of letters of announcements that you write?

A. No.

Q. Normally, that would be in your files, wouldn't it, Mr. Letzkus?

A. Yes, I would say so.

38009 Q. And yet it was obtained from the files of the Diamond Portland Cement Company?

A. Well, I will swear I do not know how it got there. I have no more idea than you have.

Q. As I understand it, you have no explanation to offer of that; is that correct?

A. No, I have no idea of how it got into his file.

Q. Have you attended any other meetings where trucking was discussed that were attended by dealers or manufacturers, or both?

A. I do not recall any.

Q. Well, you are not sure that you have or have not; is that it?

38010 A. I do not want to say definitely that I never discussed trucking, because I do not know. I do not recall ever going to any meeting. That particular one stood out, and there are only certain parts of it there, and that was the fact I had been taken advantage of. Now, I am not in the habit of going to meetings, and certainly it has been a long time since I have been in any meeting anywhere. I try to avoid those things altogether, because they are misconstrued.

Q. I just want to see if your memory serves you as to

any other meetings that you had attended concerning your policies or practices.

A. Well, I would have to say I have not.

Q. But, of course, you have attended some Institute meetings?

A. Yes, sir.

Q. Subsequent to the Code, have you attended any Institute meetings?

A. Yes, sir.

Q. District meetings?

A. District meeting at Cleveland, I think.

Q. When was that?

A. I think once, or possibly twice. I do not think—it was for the purpose of electing a trustee, and I think this present trustee has been in for, it must be, over a year.

Q. Do you know, Mr. Letzkus—we have heard from several witnesses,—if you read the record, you will know it,—that they have gone to meetings to elect a trustee.

38011 Is that all you went to meetings for?

A. And eat.

Q. You go to a meeting to elect a trustee and to eat. You could vote by proxy just as well?

A. Yes.

Q. Why go to a meeting to vote for a trustee? Is a trustee so important as that, Mr. Letzkus?

A. No, not necessarily so.

Q. Is he a vital factor in the conduct of your business?

A. No, but you got—

Q. Why would you pay railroad fare?

Trial Examiner Norwood: Let him answer your other question.

Mr. Paulson: He has.

By Mr. Paulson:

Q. Why would you pay railroad fare and go to some distant point and leave your business to vote for a trustee?

A. Why, frequently—well, I will put it this way: I know all these fellows in the cement industry, and a lot of them are pretty good friends, and some of them are not. They have a luncheon. Now, I might not have seen some of those fellows for months. I might have some business in the general area. It might not be important, but I can work it in, and I go down there and have a nice luncheon,

and we sit around and kid each other and visit, and

38012 the voting of the trustee is the smallest end of it.

The most of its talking golf, baseball, stuff of that kind. Now, that is about the whole story that goes on, those things.

Q. It is just to build up an acquaintance with each other; is that it?

A. Yes.

Q. To get better acquainted?

A. That is it.

Q. And that helps build a cooperative spirit amongst you, doesn't it?

A. I would not call it cooperative at all, because if you were a cement man, and you were there, and you had beat me out of an order, I might say, "That was a hell of a thing to beat me out of that order. I wanted that one real bad." Now, I don't think I would hesitate to make a remark like that if I felt that way about it.

Q. Isn't that true, that you belong to the Institute, attend its meetings, district and general meetings, and participate in the activities as your contribution toward a cooperative spirit in the industry?

A. Well, The Cement Institute is an industry organization, and we feel pretty proud of all the industry up to a certain point, and naturally I feel that we should belong to it inasmuch as we are in that kind of business, very much like the old Steel Institute, things like that.

38013 Q. Isn't it true that you feel that the best interests of your company lie or will be served, rather, by a cooperative spirit among competitors?

Mr. Withrow: Your Honor, I object to the question. There is no testimony by this witness that he belonged to the Institute for a cooperative spirit, or that he had it or wanted to have it. Until there is a foundation—

Trial Examiner Norwood: The objection is overruled.

Mr. Withrow: —I do not think he should ask that question.

The Witness: What is the question, please?

Mr. Paulson: Will you read it, please, Mr. Reporter?

(Question read.)

A. I do not think that it would make any difference whether we belonged to the Institute or not. It is nicer, of course, to know your competitors, and it is nicer to be on friendly terms and good fellowship rather than to be outright enemies, but I think that we would probably conduct our business just the same whether there was an Institute, or there was not.

By Mr. Paulson:

Q. I show you Commission's Exhibit 971-12-G, and ask you if that is a letter written by you and if that is your signature?

A. Yes. This was dictated by me, and is also my signature.

Q. Now, when you wrote this you were telling the truth, the whole truth, and nothing but the truth, 38014 were you not, Mr. Letzkus?

A. Well, I was not on the stand, and I was not under oath.

Q. That does not make any difference in the way you make your statements, does it?

A. And—

Q. Does it, Mr. Letzkus?

A. What?

Mr. Withrow: Let him finish his answer.

Trial Examiner Norwood: Let him finish his answer.

A. And in salesmanship there is a lot of conversation.

By Mr. Paulson:

Q. Of course, that—

A. A lot of things are said for effect.

Q. Were you trying to sell something to the addressee there?

A. No. I had his letter to answer, and I had to say something.

Q. Were you trying to mislead him?

A. No.

Q. Well, you were telling the truth, were you not?

A. Some parts of this stuff I—

Q. You stated the facts as you knew them, did you not?

Mr. Withrow: Let him finish his answer.

A. Some parts of this I believed at that time, and some I believe yet, but I changed my mind on some of it, too, since then.

38015 By Mr. Paulson:

Q. But at that time that represented your views?

A. A fairly good idea of my view, yes, in general.

Q. There was no deliberate intent to misrepresent, was there?

A. No, I would not say that.

Trial Examiner Norwood: Let me see it. Are you through with it?

Mr. Paulson: Yes.

I call Your Honor's attention to the first page (handing the document to the Trial Examiner).

By Mr. Paulson:

Q. In notice in either that letter, Mr. Letzkus, or in another one which I have here, I believe it is another one 971-11-G.

Mr. Withrow: What was that second one?

Mr. Paulson: 971-11-G. No. It is Commission's Exhibit 419-B. That this paragraph is contained in there: "Dr. Burns will doubtless communicate with you in the near future and seek an appointment. I trust you will be able to find the time to sit down with him and Dr. Clark for a further discussion of the subject."

By Mr. Paulson:

Q. Now, that indicates that you had already had a discussion with somebody. The letter is written by Blaine Smith. Will you look at that, read it carefully, if you need to, and try to recall the various discussions you
38076 had on that subject and tell us with whom you had these discussions?

A. Yes; I remember this.

Q. Take the time to read the letter, Mr. Letzkus, if your memory is not so clear at this point.

A. It is probably unnecessary. I remember this thing and getting this leter from Smith, and Clark and Burns never showed up. I never talked to them.

Q. Well, he said, "further discussion there." What discussion had you had?

A. I had not had any.

Q. Read the last paragraph there.

A. "Dr. Burns will doubtless communicate."

Q. I have read it. Read it to yourself. I have read it in the record already.

Mr. Withrow: What is the date of that letter?

The Witness: March 2, 1937.

Mr. Withrow: What is the date of Commission's Exhibit 971-12-G?

Mr. Paulson: June 11, 1935.

The Witness: Well, may I continue?

By Mr. Paulson:

Q. Yes.

A. Obviously this last paragraph, "Dr. Burns will doubtless communicate with you in the near future
38017 and seek an appointment." Now, he never did.

Q. Read the rest of it.

A. Wait. I will settle that one.

He never did. Never heard from him, and would like to, because he is supposed to be a pretty smart fellow.

"I trust you will be able to find the time to sit down with him and Dr. Clark for a further discussion of the subject."

Now, he infers,—Smith infers here,—and you might construe this to mean a further discussion with me, and yet it might mean that Clark wants to have a further discussion on the general subject of trucking to Cleveland. I never saw Clark or Burns in my life.

Q. Did you discuss trucking with Blaine Smith?

A. I would not be a bit surprised if I meet Smith on the street today I would probably say, "I do not like trucking," or something of that sort."

Q. Well, that does not quite answer. Did you or did you not discuss—

A. Do you mean in regular conference?

Q. Well, no, I don't mean in regular conference. I mean did you ever discuss trucking with Blaine S. Smith?

A. I could not tell you that, but if this will answer your question—

Q. You do not recall—do I understand first; you
38018 you do not recall whether you ever discussed trucking with Blaine S. Smith; is that right?

A. Yes.

Q. You have or have not?

A. I do not recall having discussed it with him.

Q. I see. You have no recollection?

A. Unless it would be of importance to you. For instance, I am definitely—this may help you a little bit—I am definitely opposed to trucking, and it is a selfish motive to some extent, and they have trucking now in the Cleveland area. The result of that is that I cannot get any business in there, and if I could legally and properly find some way to have trucking discontinued, I would be very happy about it. Now, that is my attitude on this trucking.

Q. Now, getting back to the question, I will ask it again: You do not recall—

A. No.

Q. —ever having discussed it with Blaine S. Smith; that is what your testimony is?

A. Yes.

Trial Examiner Norwood: What is the answer?

(Question and answer read.)

By Mr. Paulson:

Q. You do not like trucking. Now, tell us why.

A. Well, there are a lot of reasons.

38019 A. Well, there a lot of reasons and to give you the whole picture, one reason is that the location of our plant is a big disadvantage to us to truck, because we have got to go too far to get any place where they buy very much cement. Another reason is because dealers do not want it. We rarely ever have any demand for trucking. Another reason, it upsets the whole arrangement at the plant. You have got to have some place where the trucks can go in and get the cement. A truck may come in at 10 o'clock, and another might come in at three. If you got your men loading cars on the other side of the plant you have got to bring them over there. Another reason is that there are railroad tracks there that these trucks have to cross to get around to the plant; and another reason—

Q. Well, now—

Mr. Withrow: Finish your answer.

A. (Continuing) All right.

Another reason is this: When a fellow takes a truck load of cement away from there he may take it right under the nose of some good dealer, and that dealer gets

38020 sore for this man coming into a market where he is handling our cement. He might go and take it and put it on a job some other dealer sold; and there are so many innumerable instances where it is not a good thing from my point of view.

By Mr. Paulson:

Q. Why don't you want your competitors to truck?

A. Oh, that is clear, because—well, I will go back to Cleveland again.

Trial Examiner Norwood: Now, if they truck you will have to meet that condition, will you not; is that right?

The Witness: Oh, Your Honor, I am giving the reasons why I do not like trucking.

Now another—

Trial Examiner Norwood: He asked you why you don't want your competitors to truck.

The Witness: Well, I don't want them to truck because when they do it makes it too difficult and costly for me to meet the competition, and I have to lose business or get out of the market.

By Mr. Paulson:

Q. In other words, the competitors have an advantage over you in the Cleveland area from the standpoint of trucking?

A. Decidedly.

Q. You do not want them to exercise that advantage?

A. I would rather they would not, but I cannot stop

A. I would rather they would not, but I cannot
38021 stop them, but it is hard on us.

Q. What advantage do you have over your competitors to offset that,—any disadvantage you may suffer as to trucking?

A. In that same area?

Q. Well, in any area.

A. Well, I certainly do not have anything to offer at Cleveland, and the results in our business show it.

Q. Are you so situated that you have any advantage over competitors by virtue of cheaper lime deposits, or more accessible rock, or something like that?

Trial Examiner Norwood: Well, does trucking give you a local advantage?

The Witness: It would, Your Honor, if there was anybody very large to truck to, but we are in isolated area, and the nearest town of any size is 54 miles away. It is not very economical to truck long distances.

By Mr. Paulson:

38022 Q. As a practical matter, do you have within your power to change your marketing or pricing practices at will?

A. Yes.

Q. That is as a practical matter?

A. Yes.

Q. Well, I thought you said on direct that the prices

were too low in your sales area, and you wanted to raise them.

A. I would like to raise them.

Q. I ask you now as a practical matter, can you change your marketing policies at your mill?

A. And I said yes.

Q. And you say yes; why don't you raise your prices, then?

A. I want to get some business.

Q. I say, as a practical matter, can you or can you not change your prices and policies at will?

A. Now, let's get thise thing clear. I can go out.—I do not know whether this is what you mean—I can go out and raise our prices on our cement any place, but if all of my competitors are still quoting a lower price then I get no business. Is that what you ask?

Q. Then, as a practical matter, you cannot raise your prices at will?

A. Not and get business.

Q. Well, that is the practical side of it, isn't it?

A. I guess so.

3802 Q. And neither can you tighten up on your dealer policies, can you?

A. Well, we handle our dealer situation—I am not particularly concerned about what anybody else's policy is, we can do as we please with our dealers, and we try to treat them in a manner that will give us as many dealer-customers as we can get.

Q. Well, if you have it within your power to alter your marketing practices and policies at will, why is it that you haven't been more of a leader?

A. Well, I don't know why—

Mr. Withrow: May we have that question read, Your Honor?

Trial Examiner Norwood: Read it.

(Question read.)

The Witness: Shall I answer it?

By Mr. Paulson:

Q. Yes, answer it if you can.

A. Why, I do not know any reason why we should be any different than we are. Maybe somebody might call us a leader, I don't know, but—

Q. Well, you tried a little leading in 1931, did you not?

A. I do not know what is.

Q. You granted some concessions to your customers below the published prices and prevailing market, pre-
38024 vailing destination prices?

A. I would not call that leading.

Q. You did, though, did you not, just prior to May, 1931?

A. Grant some?

Q. Concessions from the prevailing market prices?

A. I think the way you put that is not exactly right, Mr. Paulson. We met a competitive condition; and—

Q. Well, you deviated from openly announced prices and from the prevailing market prices?

A. On occasion we have to meet the competition that we have encountered.

Q. Just prior to May, 1931, you did that in considerable degree?

A. That is too far back. I cannot tell you what the details of the market at that time were, but as long as I have been in the business there have been cases where there have been some special prices here and there, and you run into those things, and sometimes you get documentary evidence, other times you do not. You are satisfied if a regular customer of yours insists he got a lower price, and you may meet it.

Q. Well, those concessions reached their greatest peak of frequency along about May, 1931; is that correct?

A. I do not know whether that was the time. We run into that every now and then. Now, we had a very bad period here in '38, I do not know whether '31 was any worse than that, or not.

38025 Q. There was a great deal of instability in the market along about May, 1931, wasn't there?

A. If I recall correctly, the prices at that time were very low.

Q. Well, they were low, and there was price cutting, was there not?

A. I do not like that word "cutting,"—special prices. You do not ever cut a price.

Trial Examiner Norwood: Prices were irregular at that time?

The Witness: Yes. You do not ever cut a price.

By Mr. Paulson:

Q. Prices were irregular at that time?

A. Yes.

Q. Why do you continue to use specific job contracts that require you to deliver cement for six to twelve months at a specified price, and no advantage to you in return?

A. Well, that is the only way the customer will buy the cement for a specific job. If he is going to bid on a job—

Q. Why don't you sell your cement outright to him and make him take the risk instead of you taking it?

A. Well, you cannot do it. Your competition is not doing it that way, and we have got to meet competitive conditions, but if I am clear in your meaning, and a man goes to bid on a job, and he is going to use twenty
38026 or thirty or fifty or a hundred thousand barrels of cement, that is part of his bid, he gets that, and he cannot afford not to be protected if a higher price should come in on him.

Q. I can understand his angle, but it has always been a mystery to me, Mr. Letzkus, why the cement industry continues to use specific job contracts which are entirely uni-lateral, in favor of the dealer?

A. Entirely one-sided?

Q. Yes.

A. And if the price goes down, we have to reduce the price, but if it goes up, we cannot.

Q. And you do not get the benefit of a price advance?

A. No. I think it is ridiculous, myself, but you cannot change it. I do not know how to change it. I would like to.

38030 Q. Do you recall, Mr. Letzkus, how long you had the Government invitation known in this record as the Good Friday invitation in your possession before you made your decision as to whether to bid, or not?

A. No; but basing my judgment on the usual time, we probably had it from a week or ten days before; you generally get sufficient time to make up your bid and get it back to them.

Q. Are you in the—I have forgotten what the direct examination on this subject was, but are you in the land-grant rate territory?

A. No, sir.

38031 Redirect Examination by Mr. Withrow.

Q. Now, you testified at some length, Mr. Letzkus, about this time you were called to Cleveland by a dealer. I am not sure the record is clear on one point. When you were in the room with the dealers were any other cement manufacturers present?

A. No, sir; I was there all alone.

Q. Now, the record is not clear, either, as to whether or not you now can recall whether that meeting was
38032 in November, 1931. Can you recall that definitely, or can't you?

A. No, I cannot. I do not know.

Q. Mr. Paulson asked you if you recall sending quotations on this price increase around Cleveland in January, 1936. I will ask you to look at Respondents' Exhibit 2864-D, and ask you if that refreshes your recollection.

A. Yes, this does. This indicates that we sent out the quotations, written quotations.

Q. And would you tell us what your custom is on meeting increases in prices, to send out quotations, or not to?

A. Usually so.

Q. And how about price declines?

A. We certainly send them out quickly on price declines.

Q. Now, would you tell us, do you have a salesman located in Pittsburgh?

A. Two.

Q. Now, would you just tell us whether the freight rate book is necessary for your salesmen to quote prices in Pittsburgh?

A. Why, I—it is not necessary for them. I doubt very much if he has even got his book half the time. I think in fairness I should explain that this salesman's territory constitutes Allegheny County, which is practically Pittsburgh.

Q. And from what sources does he get his information, Mr. Letzkus?

A. Well, he is gathering it up; he is out around
38033 to the dealers every day.

Trial Examiner Norwood: Well, isn't that a flat rate?

The Witness: In Pittsburgh now there is, it is in the nature—I guess you would call it a sort of a flat price as the result of some freight changes in there where they have their

local freight rate reduced, and the customer gets part, and they kept the other. I think it made kind of a flat price similar to what exists now around, in six counties outside of Cuyahoga County in Cleveland, that is a flat price in there, all points the same.

By Mr. Withrow:

Q. Now, Mr. Paulson called your attention to Commissions' Exhibit 139-M, and directed your attention to this second full paragraph. I wonder if you would just look at that and tell us why you wanted the other companies to join the Institute, all of them to belong, or substantially?

38034 A. Well, we did not propose to go in and pay our money to help defray the expenses with a lot of other fellows being carried along on our shoulders, so I felt that most of the companies of the industry should bear their part of the burden.

38036 *Recross-Examination by Mr. Paulson*

Q. Do your freight rate books serve as price books?

38037 A. I do not understand that question, Mr. Paulson.

Q. Well, think about it a minute and see if it is not clear, it seems to me it is perfectly clear.

Trial Examiner Norwood: Well, I think he has told us already just how they figure these prices. Are they used in the matter of making or determining the prices?

The Witness: Yes, they are in this way. Can I take—I won't take long.

Trial Examiner Norwood: Yes.

The Witness: Just a second to make it clear.

You know, you can take one part of the question off of the other. What I mean is this, you know, you have been told a thousand times how these prices are gathered by various cement fellows. Well, we are doing that all the time, and we get the delivered price from any number of points around, and I take that in, and I get hold of that freight book, and if it is from Universal I deduct bags, and the freight rate, if it is some other mill I will do

38038 the same thing. If it is some other mill I will do the same thing, and finally figure out as to what, if there is some constant mill where that net applies, and

then we assuming, we take the lowest one, and that is what you are going to stick to until we find something different, because we know at least that one plant is quoting that price consistently in that area. Now, in order to get that I must have freight rates.

By Mr. Paulson:

Q. You ascertain that, then figuring out again, can you use the freight book, it becomes then, in effect, a price book, does it not?

A. It becomes a contributing factor.

Q. Well, for all practical purposes, I am asking, isn't it your price book?

A. Well, I think—I don't like to disagree with you, but I think you are using a misnomer there. It is a freight book, and it contributes towards a price book. Now, I would be more inclined to use our price book.

Q. Do you have a price book?

A. We do not have a price book, but we have—

Q. What do you use in lieu of a price book?

A. Price cards in the office.

Q. Do the price cards contain any different information?

A. They contain the price.

38039 Q. Then the freight plus the so-called bases?

A. Well, they show delivered price—

Q. In other words, you have your price information in two places on your cards, and in your freight books, by adding the sum of your freight to the so-called bases; is that correct?

Mr. Withrow: I assume my objection goes to this entire line.

Trial Examiner Norwood: Yes.

A. I would like to agre with you, but I cannot, because I cannot construe a freight book to be a price book. It is only one part of the thing. It is like you got a pair of pants but you haven't got the coat. You have got to put the whole thing together before you got the whole suit.

Now, we use the freight in that freight book, and we know that we get 40 cents for bags over here; we will say, or out of our memory we get that, and then we have that mill net, and that particular mill I was telling you about we do not show that in the freight book, we put that on, and get the whole thing, and the whole thing combined makes the price at some given point.

38041 D. S. BROWDER, recalled as a witness on behalf of the Respondents, having been previously sworn, testifies as follows:

38043 *Direct Examination by Mr. Brick:*

I am associated with the Pennsylvania Dixie Cement Corporation and hold the position of traffic manager with that company. I first become associated
38044 with Penn-Dixie on February 23, 1931 and have held the position of traffic manager since that time. Prior thereto I had been connected with other cement companies—namely, with the Phoenix Portland Cement Company in Birmingham, Alabama in February 1923; with the Lone Star Cement Corporation in May 1925, which at that time was called the Alabama Portland Cement Company; with the Phoenix Portland Cement Corporation in 1926 and with the Alpha Portland Cement Company from 1928 until I came with Penn-Dixie;
38045 I was traffic manager of each company except the Alpha Company, where my title was traffic manager and assistant sales manager.

With the Penn-Dixie Company I have direct supervision over all of the rate and transportation matters involving our company, and in coordinating the work of the traffic department with the sales department, and in assisting the sales department in various matters which they handle. I am furnished various reports by the sales department where there is any connection with my department, and I have to arrange my work and do the things that are necessary to enable the sales department to handle the things that they must. In other words I have to work the traffic work into the sales work. I am familiar with the activities of the sales department in the home office and with the sales methods and policies.

Mr. Blaine Smith was associated with Penn-Dixie when I came with the organization in 1931. I believe he came with them in 1928. He left our company in July 1936.
38046 The witness identified Resp. Exs. 2893 and 2894 as copies of regular records kept by Penn-Dixie; Resp. Ex. 2893 as a statement showing shipments by years from each of its eight plants during the period 1927 to 1939, inclusive; Resp. Ex. 2894 as a statement showing

monthly and yearly shipments from Penn-Dixie's plant at Portland, New York, during the same period. These records are kept in the regular course of Penn-Dixie's business and it is the regular course of that business to keep such papers as these. The witness indicated the locations of the various plants which are referred to at the heading of each of the columns on Resp. Ex. 2893 as follows: Plant No. 1 is located at Kingsport, Tennessee; plant No. 2, Clinchfield, Georgia; plant No. 3, Richard City, Tennessee; plant No. 4, Nazareth, Pennsylvania; plant No. 5, Penn-Allen, Pennsylvania; plant No. 6, Bath, Pennsylvania; plant No. 7, Portland Point, New York; and plant No. 8, West Des Moines, Iowa, formerly known as Valley Junction, Iowa.

38047 *Examination on Voir Dire by Mr. MacIntyre.*

Q. Referring to these documents that Mr. Brick has just offered, when were those documents made up?

A. These particular documents were made up on this date, January 19, 1940.

Q. For use in this case?

A. Yes, sir.

Q. Well, the documents, of which they are copies, they were made up when?

38048 A. Oh, they are the running records of the company. They were started in 1927, and continued right through. I copied onto that statement the figures from the other record.

Q. Do you mean that these are copies of regular records that have been kept over this period of time in the records of your company, Mr. Browder; is that what you are attempting to say?

A. That is correct.

Q. In other words, these copies are just merely copies of documents you had all these years in the offices of your company?

A. No, they are not exact copies, Mr. MacIntyre. The record that I copied that from is carried month by month, and these are the totals for the year, and I copied only the yearly totals out for one of the statements there, and the other—

Q. Oh, I see.

Now, you have answered the question. They are not

copies of your company's records, but they are tabulations that you have made up from your company's records?

A. That is correct.

Q. For use in this case?

A. That is correct.

Q. Now, I will ask you this: Haven't you also made up annually—well, I would say monthly—information of this character; in fact, involving these precise figures, and sent it monthly to the Bureau of Mines in Washington.

38049 A. That is correct.

Q. And this same information would be down there?

A. That is correct.

Q. Against which it may be checked; is that correct?

A. It would be in more detail than that, Mr. MacIntyre.

Q. But it would sum up to the same thing?

A. That is correct.

Q. And that may be used to check this with?

A. That is correct.

Mr. MacIntyre: If Your Honor please, if we are permitted to use those records down there to check these, we would have no objection to these; otherwise we object.

Mr. Brick: May I ask the witness a question, if Your Honor please?

Trial Examiner Norwood: Certainly.

Direct Examination (resumed) by Mr. Brick.

Q. Mr. Browder, do you vouch for the accuracy of the figures appearing on Respondents' Exhibits 2893 and 2894.

A. Yes, sir.

Q. Do those figures correspond with the figures kept on the records of the company with respect to the items described on these exhibits?

A. They do.

Mr. Brick: The offer is still pending.

38050 Trial Examiner Norwood: Well, is the supporting data available to the Commission for checking these? That is all I require. But if it is not, I am going to sustain the objection.

Mr. Brick: Well, let me ask the witness a few more questions.

By Mr. Brick:

Q. Mr. Browder, is it your shipping department at the mill which tallies the various shipments which go out of the mill?

A. They do, and report it to the home office.

Q. And the shipping company keeps records—that is, the shipping offices keep records of the various shipments made out of the mills?

A. Yes, sir.

Q. Tracing the various records kept from the mill office to the home office, will you tell us the source of material which might be available, and which leads to the figures appearing on these exhibits?

A. Well, each day we get from each of our mills in the New York office information as to the number of barrels shipped that day, and that is furnished all through the month. At the end of the month we also get the total shipments for the month, which should tally with the totals we have received, we have already received day by day, and that is carried on through the year for each mill; and the same thing holds true at the end of the year. They
38051 furnish us with their total, which should balance with our total.

Mr. MacIntyre: I would like to ask Mr. Browder a further voir dire question.

Trial Examiner Norwood: All right.

Voir Dire Examination by Mr. MacIntyre.

Q. Mr. Browder, do you object, as a representative of your company, to our checking these two offered exhibits with your reports that you made to the Bureau of Mines?

Mr. Brick: I object to that question, if your Honor please.

Trial Examiner Norwood: Well, I will ask the question of the Counsel.

Mr. Brick: That is better.

Mr. MacIntyre: I ask, if Your Honor please, that the witness be permitted to answer my question.

Trial Examiner Norwood: I will sustain the objection. Let Counsel answer that question.

Mr. Brick: May I hear that question read?

(Question read.)

Mr. Leisure: May I answer that, if Your Honor please?

Trial Examiner Norwood: Yes.

Mr. Leisure: It is my understanding that Mr.
38052 MacIntyre has something in the Bureau of Mines' figures which he has been trying to get since this case began, which the Bureau of Mines has consistently refused to give to him. I do not know what it is, but I am not interested in knowing what it is. Until there is some showing that there is some necessity for his going to the Bureau of Mines and going through the files of the Bureau of Mines' figures, I must say that we object to his doing it. At least until we know what he is after. There is no occasion for his doing it, as far as this exhibit is concerned. If we are willing to produce here the supporting data from these companies' own books there is certainly no occasion for Mr. MacIntyre satisfying his desire to get to the private records of the Bureau of Mines.

Mr. MacIntyre: If Your Honor please, I would like to make clear my position on that to you.

We are not asking anything of anyone other than asking this company, through this representative, what its position is as to the Bureau of Mines turning over to us the figures which he has submitted to them, and which he says complies with these, or conforms to these.

We do not want to see anything else the Bureau of Mines has got.

Mr. Leisure: We have repeatedly told Mr. Mac-
38053 Intyre on the same subject we objected to his going to the Bureau of Mines and breaking their rule of having outsiders come in and inspect their private records.

Mr. McIntyre: We do not want to inspect them.

Mr. Leisure: As far as this exhibit is concerned, there is no occasion for bringing the Bureau of Mines into it. Mr. MacIntyre dragged the Bureau of Mines into it, himself, for the purpose of carrying on this argument he is now carrying on. The only thing before the Examiner at this moment is whether or not that exhibit is admissible in evidence, and I suggest to Your Honor that if we offer to produce the underlying data this argument about the Bureau of Mines is entirely aside from any point that we ought to be discussing now.

Mr. MacIntyre: On that point, if Your Honor please, it seems that we should have a right to at least specify the kind of reliable underlying data that we feel that should be submitted to check with. This thing of saying that a

certain report is the proper underlying data is not the original record of entry at the mills, and our objection stands if they do not want to open up sufficiently to let this witness to tell us what is the position for his company on the question I asked him. I think we are entitled to know it.

Trial Examiner Norwood: Now, I do not see any
38054 harm that can come to the Respondents from giving them permission to check this particular data with the Bureau of Mines, and I do not see that that would give him any right to get or to use anything else. I should not receive anything else that is gotten.

Mr. Leisure: He has got something in mind, he has been asking for,—

Mr. MacIntyre: Well—

Trial Examiner Norwood: That would amount to making him a trespasser ab initio.

Mr. MacIntyre: That is all we ask.

Trial Examiner Norwood: Now, I shall sustain the objection to this until such time as the supporting data is brought in and made available to the Commission's Counsel.

Mr. Brick: Will Your Honor be satisfied if we bring in the original ledger sheets of the companies?

Trial Examiner Norwood: I think so.

Mr. Brick: That will be satisfactory.

Trial Examiner Norwood: Yes. If he wants any more data to check further, that is, makes any reasonable demand, if it is just as reasonable and is not complied with I will withdraw them after that.

Mr. Brick: Of course, Your Honor appreciates the witness vouched for these figures.

38055 Trial Examiner Norwood: Yes. All I say is that this whole store must be available, and if it is not, then I shall not receive part of the story on an abstract. Proceed.

Mr. Brick: Well, this— May I mention in passing, if Your Honor please, that these figures are just the totals for each year from each mill, so it really is not one of those questions where it is a part of the picture. This is the picture. All we are offering it to show is the number of barrels shipped by this company from its various mills in different years.

Trial Examiner Norwood: It is a matter which involves

might involve the drawing of one inference from a certain total, and then another inference from certain other totals. You might draw one inference from monthly shipments, and another inference from just yearly shipments. I do not know just what it is, except that the supporting data must be made available.

Mr. Paulson: I would like to add to the objection that the documents are irrelevant. There isn't any issue about the shipments here.

Trial Examiner Norwood: Well, we haven't gone into that question.

Mr. Brick: No, but that reminds me of something else, I think Your Honor will be interested in. We are
38056 following the same practice in offering these as Mr. Paulson, Mr. MacIntyre, and Mr. Wooden followed when they offered figures of a similar character with respect to other companies during the course of the presentation of their case. In some cases, I don't know where they got the figures, and in other cases they asked Respondents' representatives to bring them in, just as we have asked Mr. Browder to do, so we certainly have no distinction.

Trial Examiner Norwood: Yes, but you understand that it depends entirely on who has the rest of the story. I would admit piecemeal data from the side that is not able to get any more, where the other side has the complete story.

Go ahead.

Mr. Brick: Well, that is strained, as far as I can see—

Trial Examiner Norwood: That is what?

Mr. Brick: Strained.

Trial Examiner Norwood: Strange?

Mr. Brick: Yes, that is a strained view, as I see it, of the situation.

All we are offering these figures for—

Trial Examiner Norwood: I think that your characterization—

Mr. Brick: Pardon me, sir.

38057 Trial Examiner Norwood: —is not so well taken.

Mr. Brick: Well, I am sorry. I am directing my remarks to the comments made by Mr. Paulson and Mr. MacIntyre.

Trial Examiner Norwood: Yes, but the remarks immediately followed by the announcement of the principle on

which I was acting, that is not strange or strained, and I hope you won't characterize it as such.

Mr. Brick: Well, I do not understand what Your Honor refers to. There is no intention on my part to characterize anything you might have said or anything you might think. I do not propose to do that. I do propose to state the position of the Respondents with regard to your rulings, and also the objections, and the grounds stated by Counsel for the Commission, and in that connection I do say that their position is strained. Now, if Your Honor adopts that position, why, that might inferentially apply to Your Honor's ruling, but after all it is necessary for me to state our position.

Trial Examiner Norwood: You have stated it.

By Mr. Brick:

Q. Now, Mr. Browder, are you familiar with the history of the Penn-Dixie mills with respect to whether they have or have not been base mills in the past?

38058 A. Yes.

Q. Have any of your Lehigh Valley mills been base mills?

A. Our mills in Pennsylvania are base mills to the extent that one of them is located at Nazareth, Pa., where there is another mill which is a base mill and there there is a 30-mile—20 to 30-mile radius from all our mills beyond which our rates are the same as from all other mills in the district which for all practical purposes makes those mills base mills.

Q. Now, have you ever initiated any changes in the price base at any of your Lehigh Valley mills?

A. No.

38059 Q. Have you followed the competition of other mills in the Lehigh Valley?

A. We have.

The witness identified Resp. Ex. 2895 as a map of the Lehigh Valley district showing the location of the various cement mills in that district, "and the territory in which lower freights are applicable from one or more mills than from the other mills." The rates are the same from all mills in so far as shipments to points outside of the red boundary in the center are concerned. The cement mills are indicated on the map with red and the dot is circled in red.

Q. And what is the situation with respect to freight rates within the boundaries of the red lines?

Mr. Paulson: Now, just a minute. I think it is very clear from the preliminary questions that Mr. Brick
38060 has asked that this document comes outside of the scope of material which Your Honor is receiving in this case at the present time. Unless Mr. Brick can show by an offer of proof that it does not, I think that it should be precluded from any further taking up the time of the Court. We are busy men, and hearing time here has already passed the normal hearing time in this case. I think we ought to get down to the issues.

Mr. Brick: Yes, but you are the cause, Mr. Paulson, and your associates for the abnormality with regard to the time. After all, we have just started here.

Mr. Paulson: Well, it is very plain—

Trial Examiner Norwood: What do you want to show by that map?

Mr. Brick: I want to show the background of the statements made by the witness in response to the questions I have put to him, and so that we can have in the record a clear-cut and accurate portrayal of the exact freight rate situation in so far as it relates to all of the many mills in the Lehigh Valley.

Mr. Paulson: I say we have had that showing.

Trial Examiner Norwood: Wasn't that shown?

Mr. Brick: No, sir. That is the only document in the case of that character, and the Government Counsel have been very careful, I think, to make sure that they
38061 did not have a full explanation of it.

Trial Examiner Norwood: Now, did this witness draw this map? Can he verify to its accuracy?

Mr. Brick: I do not know. I can only ask him one question at a time. I was cut off.

Trial Examiner Norwood: Well, ask him about it.

Mr. Paulson: I do not think this is pertinent at all. I think again Mr. Brick is addressing himself on this line of proof to the proposition of what would happen if they went over to an f. o. b. mill system.

Trial Examiner Norwood: Is that what you are driving at?

Mr. Brick: No, sir.

Mr. Paulson: If not—

Mr. Brick: I am driving at facts, and that is all I think we are doing with this offer.

Trial Examiner Norwood: Please discontinue the dis-

cussion and let him show us the relevancy by other than vague and general statements, and I will consider anything he has to say about it.

By Mr. Brick:

Q. Mr. Browder, did you prepare this map?

A. This map was prepared under my supervision, and with my help.

Q. Will you vouch for its accuracy?

38062 A. Yes, sir.

I would like to make a little statement there. I would vouch for its accuracy at the time it was prepared. Since it has been prepared there have been a few stations in here which have been abandoned, abandoned stations, but at the time it was prepared it was correct.

Q. And when was it prepared, Mr. Browder?

A. Last summer.

Mr. Paulson: I want to point out something to Your Honor which occurs to me right at this point.

Mr. Brick: Is this an objection?

Mr. Paulson: Yes, it is an objection.

Mr. Brick: There is no question pending.

Mr. Paulson: I object to any continuation along this line. Your Honor ruled out all the maps prepared by Mr. White and the charts. They were the basis for economic testimony. They were to simplify the case from the Government's standpoint so that it would be easier for Your Honor to analyze it, and for the Commission to analyze it, and we were ruled out. Now, comes the Respondents, they are simplifying, they are graphing this picture, they are putting it on maps and everything else, taking up the time of the hearing, doing the very same things we were precluded from doing, so that they will have pretty picture
38063 charts and things to show to their economists when they put them on the stand. Now, it is not fair for one side to be precluded and the other side to be allowed to do it.

Mr. Brick: That was not the reason why Mr. White's charts were excluded.

Mr. Paulson: It certainly was.

Mr. Brick: They were excluded because they were inaccurate. And I offer this subject to such check as Your Honor or the Government Counsel might want to make.

Mr. Paulson: These things can be taken up in brief. There is not a solitary bit of information there that cannot

be taken out of the record after the case is closed and put on a map.

Trial Examiner Norwood: If Counsel will give me a chance to find out, what is it that you want to illustrate by this map, the boundaries?

Mr. Brick: Just what I said. There is a situation in the Lehigh Valley where there are a great many mills which has given rise to a very complicated freight structure. Now, Government witnesses and some of the other witnesses have talked about some of those situations, but no witness to date has given what I consider a full picture of that entire situation.

Now, you have certain zones around each of the mills where they had different freight rates from the mills.
38064 Then, to the extent that the various boundaries around each of those mills coincide with one another, you then have a larger area, which is more or less the outside boundary of each of those overlapping circles, and then beyond all points outside of that larger boundary there are equal freight rates available to all of the mills no matter where they are located in the Lehigh Valley, and that to my mind is very important not only from the standpoint of the Commission, knowing what the situation with regard to freight rates is in that section, which is the heart of the cement industry, but also with regard to clearing up the hearsay and inaccuracies which were brought out by Government Counsel in the course of their attempts to explain it.

I think it is a thing that has been attempted, but so far has not been completed, and I think that the map is the easiest way of handling it. I was not going into any detail on it.

Trial Examiner Norwood: What bearing has that information on the issues here?

Mr. Brick: Well, let me read you something, Judge.

Trial Exami[illegible] Norwood: Can't you answer it without reading something that goes more directly to the point?

Mr. Brick: This is the clearest way. It is a statement of Your Honor's in connection with freight rates which
38065 were offered by Government Counsel.

Trial Examiner Norwood: Go ahead.

Mr. Brick: Now, at page 9445 and 9446, Mr. Wooden offered in evidence Commission's Exhibit 1317-A, B and Counsel for Respondents objected to it on the ground that it was immaterial, and Your Honor stated, "It deals with

destination prices and destination costs that involve freight rates. There is also in issue in this case the effect of the basing point system, and I imagine our freight rates will have to be considered on that question."

Also Your Honor stated, on page 9447—

Trial Examiner Norwood: Well, now—

Mr. Paulson: Just a minute.

Now, you have allowed Mr. Brick to talk for ten minutes, Your Honor, and cut me off.

Trial Examiner Norwood: Kindly wait until I get through with my question and I will hear you very patiently.

Mr. Paulson: Well, all right.

Trial Examiner Norwood: It is not relevant what I said on some other occasion about something else. Why can't you simply answer my question and show me that this comes within the consideration which I had in mind at that time.

38066 Mr. Brick: Well, Judge, you were talking about freight rates. That is what I am talking about. We were talking about freight rates, and you stated that freight rates generally were important in the Commission's presentation of its case.

Trial Examiner Norwood: Well, can't you point to me what information you want this map to be the basis of and how it applies to the issue?

Mr. Brick: Yes, sir. I thought I had done it.

Trial Examiner Norwood: No, you have not.

Mr. Brick: I think that it is important particularly from the various allegations in the complainant concerning the effect of the alleged practices stated in the complaint, and it was on that basis that Your Honor received evidence concerning freight rates and the relations between freight rates as applied to different mills in connection with the offers made by Mr. Wooden.

Trial Examiner Norwood: And the effects that these freight rates would have on pricing?

Mr. Brick: Well, you did not mention that before, Judge, with regard to the offers that I had in mind, but I can see a certain amount of relevancy there, too. But here is something really fundamental. The cement industry grew up in the Lehigh Valley. Now, certain competitive conditions brought about certain difficulties
38067 with regard to freight rates, and the railroads did something about them, and I want to show a com-

plete picture of what that situation is, and I am trying to do it by the shortest possible means of having an expert who knows something about the situation draw his map, and I offer the map and let the map speak for whatever facts it represents.

Trial Examiner Norwood: I am just trying to find out what this is going to. Is it going to the question of whether or not selling f.o.b. mill would make a local monopoly, or just what?

Mr. Brick: No. That has been established already. I would rather not bother with that.

Trial Examiner Norwood: Now, Counsel can point out just what he wants this to go to, and then I will know how to rule on it.

Mr. Brick: I think it should be sufficient to rely on what I have already said.

Trial Examiner Norwood: What does it go to? Why do you want to bring out the information about these freight zones?

Mr. Brick: Because Mr. Wooden did it and did not complete the entire picture, and did it through witnesses who apparently did not have accurate knowledge of the situation, and that the record, as it now stands, is entirely distorted on all facts relating to the relation of 2068 freight rates on shipments out of the Lehigh Valley.

Trial Examiner Norwood: Is that on the issue of effect, or on what issue?

Mr. Brick: The purpose he offered it for or on which it was received, the Lord only knows. In connection with those things, Judge,—

Trial Examiner Norwood: I think I will hear from Mr. Paulson.

Mr. Paulson: On the points we have been discussing right now, there are only three essential things, as I see it, three subjects about which we can receive basic facts, that is, there are three principal things which are basically factual. Anything beyond those three are subject matters for briefing, for argument, and those three, I think, are base points; I dare say we need to know the base points that are in existence, that is, were in existence when the complaint was issued, what have been in existence during the time embraced by the complaint. All right, base points. Then we need to know the freight rate from these various base points. That was necessary because of the testimony

we have had of the basing point system here. Knowing base points and knowing freight rates we will be able to ascertain a great deal. The third thing which we will have to know is the location of the mills. Then we will
38069 know whether there is any discrimination in price, and whether or not what territories then can sell in, how they overlap, and so forth. But those three things, base points, freight rates, and location of the mills are the basic things. This is a superstructure, I think, nothing more. This is just some graphic picture of those basic facts.

Trial Examiner Norwood: Well, I am inclined to think something of that character was received at one time from Mr. White. We all agreed it would be better if they be withdrawn and to be included in the brief; I think this is in the same category exactly to that which you objected to so strenuously some time ago.

Mr. Brick: That is not correct, if Your Honor please.

Trial Examiner Norwood: The only difference is you say the White map is wrong, and this is right.

Mr. Leisure: Isn't that enough difference for an exhibit?

Trial Examiner Norwood: I hardly think so.

Mr. Leisure: Well, we will stand on it.

Trial Examiner Norwood: Because the consideration that I—

Mr. Brick: Well, here, I can state this, if Your Honor please, I should think this map, as described by the witness, would be material and relevant only on the
38070 point of explaining why the base figures at each of the mills in the Lehigh Valley are the same.

Trial Examiner Norwood: Have you offered that yet?

Mr. Brick: No. I will do it now, sir.

Trial Examiner Norwood: All right. Read my statement.

(Statement of the Trial Examiner read as follows: "The only difference is you say the White map is wrong and this is right.")

Trial Examiner Norwood: I just did not want it to appear whether I stated any opinion about right or wrong.

Mr. Paulson: It should be noted no map was offered by Mr. White, or through Mr. White, of the Lehigh Valley that I know anything about, and Mr. MacIntyre says he does not remember any such map. I do not think there was, either.

Trial Examiner Norwood: Well, state your position on that proffer.

Mr. MacIntyre: It is objected to as immaterial.

Trial Examiner Norwood: The objection is sustained. I think it is something you can put in your brief; bring out the facts by this witness.

Mr. Brick: All right, sir.

Trial Examiner Norwood: I have admitted a considerable number of maps here from Respondents to 38071 illustrate points.

Mr. Brick: Well, they are not points related to the facts appearing on this map, if Your Honor please. I thought Your Honor understood that.

Trial Examiner Norwood: I understand that. Go ahead.

By Mr. Brick:

Q. Mr. Browder, will you explain the relationship between the freight rates among the various mills in the Lehigh Valley, taking into account the short-haul shipments around the various mills and the conditions further away from the Lehigh Valley?

A. Do I understand that you want me to give the conditions that brought about this rate adjustment, and so forth?

Q. No, sir. I want you to state what the situation is at the present time with regard to rates from the various mills.

A. I see.

Q. Taking into account short hauls and long hauls.

A. The rates from mills in the Lehigh Valley district are made on a mileage basis from each mill for a distance of about 20 miles; beyond the 20-mile area from each mill all of the rates are figured on the distance from Northampton, Pa., which is considered the central point in the group. Now, when they fixed the rate for the 20-mile distances, and then fixed the rate for the points beyond there were some places where the jump was too steep in the 38072 rates; in other words, they increased too swiftly, and the rates were, as we call it, feather back to realign them, to take out that steep increase from one zone to another so that in some instances ran the distance up to about 30 miles, 29 or 30 miles, but beyond that zone all of the rates are the same and are figured on the mileage from Northampton.

Q. Are you familiar with the points beyond which all the mills take the same freight rate on shipments from the mills in the Lehigh Valley?

Trial Examiner Norwood: I do not see what Counsel wants to bring out here.

Mr. Brick: I want to bring this out. I mentioned previously, if Your Honor please, that there are several points I think that are very important to show the extent of the territory where the freight rates are different in the Lehigh Valley and the extent to which such mills take the same freight rates outside of the Valley.

Trial Examiner Norwood: What does that go to?

Mr. Brick: If for no other reason, Judge, to explain why the base figures at those mills are the same.

Mr. Paulson: We proved that in our case.

Mr. Brick: You see competition among those 38073 mills is met at destination and by subtracting the freight rate you always get the same figure at each of the mills in the Lehigh Valley. Now, I want to show the extent to which those mills in the Lehigh Valley have different rates and the extent to which they have the same rates.

Mr. Paulson: The witness just told us that, and we proved it three times by three or four different witnesses. There is no issue about that at all.

Mr. Brick: Well, all I wanted to do was to offer the map for its factual content. I think it was proved and vouched for, and I could have been through several subjects by this time.

Trial Examiner Norwood: Well, go ahead.

Mr. Brick: Read the question, will you, please.

(Question read.)

Trial Examiner Norwood: The objection is overruled. Answer the question.

A. I could not name the specific points, but I am familiar with the territory.

By Mr. Brick:

Q. All right.

I show you Respondents' Exhibit 2895, for identification, and ask you if that refreshes your recollection?

A. Yes.

38074 Q. Now, will you name the points on the various railroads which carry shipments out of the Lehigh

Valley and beyond which points the rates are the same from all mills within the Lehigh Valley?

Mr. Paulson: Well, of course, it leads us into argument to object, but only one further point I can make, is that we will have to look at this thing a little bit more broadly in order to see that these questions are immaterial and irrelevant, and I suggest just looking for a moment at the whole picture. There is nothing in this case centering around the Lehigh Valley. This is a complaint which envisages the national situation, and there is nothing about the Lehigh Valley which has any significance to it. If we were to spend—in other words, if we were to take the time now and show what points were equidistant from Northampton, freightwise, we could tomorrow call a witness from San Francisco and show what points were equi-distant from San Francisco, or Cleveland. It is immaterial. We object to it.

38075 Mr. Paulson: It is accumulative, every bit of it.

Trial Examiner Norwood: I think you have already shown that. I am going to exclude it. You may take that testimony and the data and use this map in briefing, show the Commission all about it and not waste any more time on it.

Mr. Brick: There is nothing in the case proving the margin between those two areas, nothing at all.

Mr. Paulson: Suppose the margin is X, or suppose it is Y, how does that affect this case? Not at all.

Trial Examiner Norwood: Counsel hasn't shown its relevancy, has not shown me what he wants to establish by those facts, or how in any way they connect with the issues in this case.

Mr. Brick: Well, I have done everything but write a brief on it.

Trial Examiner Norwood: I am going to exclude 38076 this whole line and give you an exception.

Trial Examiner Norwood: The objection is sustained.

By Mr. Brick:

Q. Mr. Browder, about what percentage of the total shipments of the Penn-Dixie's three Lehigh Valley mills are made to points where it does not have equal freight rates with competing mills in the Lehigh Valley?

A. Oh, approximately one percent of our shipments.

Q. Does that mean that 99 percent of the shipments

from each of those three mills takes the same freight rate as competitors' shipments out of the Lehigh Valley?

A. That is correct.

Q. Now, are there any large consuming points within the area where the freight rates are not equal to the various mills?

38077 A. I would not call them large consuming points. The largest points are Allentown, Easton, Bethlehem, and Reading. The others are generally very small villages.

Q. Now, inside the area where the freight rates from the various mills are not equalized, do your mills have any freight advantage?

A. We have an advantage over some mills, but we do not have an advantage over all mills. For instance, we have a mill at Nazareth, and there is another mill there, so we have no advantage over that mill. Our mill at Penn-Allen has a mill on one side of it at Nazareth, and a mill on another side at Bath, so that has no advantage over any other mill.

The mill at Bath would be the only one that would have any outlet that does not have a mill on the other side of it, but there is another mill at Bath, so we have no advantage there over every other mill.

Q. In the course of a year, Mr. Browder, about how many barrels of cement do you ship to the points where you do have an advantage over the other mills in so far as shipments in the Valley are concerned?

38078 Oh, I would say not over three or four thousand barrels.

Q. Now, was there a time, Mr. Browder, when the various mills in the Lehigh Valley all had substantially different freight mills to nearly all points outside the Valley?

A. The rates were substantially different prior to 1929.

Q. Will you explain what happened at that time?

A. Well, prior to 1929 the rate adjustment on cement in the East had grown up with the industry to a certain extent, and the rates were more in the nature of a hodge-podge than a general adjustment, but about 1925 there were a number of complaints filed with the railroads and a number of complaints about that time with the Interstate Commerce Commission about certain adjustments. Then the railroads tried to figure out some kind of an adjustment in the East that would be satisfactory to everybody, and

eliminate all of these complaints, and they held a number of conferences with the various cement shippers, and finally arrived at this basis which is now in effect, and which was put into effect on January 29, 1929.

Q. How were those adjustments made?

A. Well, the basis for the rates was 114 percent of the scale which had been ordered in by the Interstate Commerce Commission in Docket No. 12710, which had application in Illinois, and which was voluntarily extended by the railroads to include the States of Ohio and In-
38079 diana. There were some variations made from that 114 percent basis to enable the mills in the East to compete with the mills located in Illinois, Indiana and Ohio, that is along the borders of the two territories. In those cases they made the rates to what they called the Buffalo-Pittsburgh territory, or a border line of the two territories the same as the so-called 12710 scale. Then they feathered those rates back to where they met the 114 percent of the scale.

Now, those rates right along the Buffalo-Pittsburgh area were 103 percent of the scale. A little further east of that they were 105 percent, I believe, and a little further on 108 percent, 110 percent, and finally they reached 114 percent scale.

Now, the complete adjustment was that they did not adopt the short-line rates that the 12710 scale authorized but put in the short-haul rates on a much lower basis for those distances that I have previously mentioned of 20 and 30 miles from each individual mill.

Now, that satisfied all of those complaints, and all the complaints before the Commission were withdrawn, and the complaints that had been filed with the railroads were satisfied.

Q. Now, what was the general purpose, Mr. Browder, which underlied the readjustments you described?

A. It was the competition of the various cement
38080 mills for business on an equal basis.

Q. —of the railroads in this connection?

A. They were in the same competitive conditions that the cement mills were, and they were glad to make any adjustment which would satisfy, put everybody on an equal basis mileage considered, and overcome these discrimina tions that had existed in the past.

Q. Now, when you mentioned, Mr. Browder, the Lehigh

Valley area, just what area do you include? I think we ought to be definite about it.

A. Well, the Lehigh Valley area includes a group of mills located along the Lehigh River where there are—where there was an outcropping of cement rock there. It is about, oh, 20 miles in width and probably 40 miles, or 45 miles, in length.

Q. And over what area were the rail adjustments made?

A. They were made over all of the so-called East-
38081 ern Trunk Line territory, which takes in all of the State of New York, Pennsylvania, Maryland, New Jersey, Delaware and West Virginia, the District of Columbia.

Q. You say that these rates and adjustments became effective in 1925?

A. 1929.

Q. 1929. Who made the final decision as to what those adjustments or rates would be?

A. The railroads.

38082 Mr. Brick: Now, with respect to the adjustments which you have discussed, Mr. Browder, they did not apply to the New England States, did they?

The Witness: No.

By Mr. Brick:

38083 Q. Now, what was the situation in the New England States about the same time?

A. Well, the rates into New England were in the same condition as they were in the East. They were more of a hodge-podge adjustment, and numerous complaints were filed which were finally brought to the attention of the Interstate Commerce Commission under Docket 18112, and in that—

38084 Trial Examiner Norwood: I think that answers it.

By Mr. Brick:

Q. Will you explain, Mr. Browder, what, if anything, was done by the railroads in connection with that condition?

A. There was nothing done by the railroads which in any way satisfied the situation that existed.

Q. Were any adjustment worked out?

A. No, except under the Commission's order in that case.

Q. Was that matter concerning the rates in that area brought to the attention of the Interstate Commerce Commission?

A. It was.

Trial Examiner Norwood: Well, this man could tell us about it i. I could see that it applies to the issues in any way; if Counsel would show me that.

Mr. Brick: We want to explain, if Your Honor please, the various reasons why the rate situations are as we find them, and what has been done by the Interstate Commerce Commission in helping cement manufacturers to compete with one another in various territories, and how certain discriminatory rates were wiped out for the purpose of permitting some mills to get further away from their mills in meeting competition; and matters of the kind.

Mr. Brick: And to explain just how the cement manufacturers acted with respect to the rates, and what the Interstate Commerce Commission did with regard to those various conditions, and also for the purpose of letting the Commission know what the factual background of the rate situation is. It is more important than any one factor in the determination of the prices which are made on cement.

Q. From your experience, Mr. Browder, what was the condition relating to the rates in the area which you have described, including New England and adjoining States prior to the time that the Interstate Commission took any action?

A. As I said, the rates were in a hodge-podge condition. There was no basis of relationship between the various rates. They had just grown up with the industry.

Q. And who made those rates?

A. The railroads.

Q. And were there any complaints on the part of cement manufacturers concerning those rates?

A. Yes.

Q. Were there any complaints on the part of the railroads relating to those rates?

A. Not filed; there were no complaints filed. There were places where the railroads tried to make adjustments, which showed that they did not approve of them.

Q. And what action, if any, did the Interstate Commerce Commission take with regard to that condition?

A. They issued their order after the hearing in the case and fixed the rates from the Hudson River mills and from the Lehigh Valley district mills into New England.

38092 A. The Commission's order in that case, Docket 18112, fixed the rates into New England on a mileage basis and grouped the rates in the Lehigh Valley district on the average—I mean on the mileage from Northampton, which they stated was considered the average distance in the group. From the mills on the Hudson River, which include Howes Cave, Hudson, Alsen, and Glenns Falls, N. Y., they fixed rates on the mileage scale for a distance of 70 miles from each mill on its own mileage. Beyond that 70 miles the rates were all made on the average mileage from the four producing points.

Those rates were somewhat higher than the rates which were established in the Eastern Trunk Line territory. Into the northern part of Maine where it is sparsely settled the order of the Commission authorized arbitraries for those railroads to be added to the mileage rates after they were established, after they were ascertained. This arbitrary was added to increase the revenue of those lines.

38093 Q. Now, what was the general result, Mr. Browder, of that change in the situation?

A. Well, all of the complaints against those rates were satisfied, and there have been no complaints since that time, and traffic has moved from the Lehigh Valley district, as well as the Hudson River district mills into that territory on those rates fixed by the Commission.

Q. Did the adjustment make it more difficult or less difficult for the Penn-Dixie Company to ship into New England?

A. It made it less difficult for us to ship in there.

Q. And those shipments of Penn-Dixie would be from its Lehigh Valley mills, would it not?

38094 A. In most cases; there are a few shipments made to New England, have been all along, from our Portland Point plant.

Q. Just so there will be no misunderstanding concerning it, was it more or less difficult for you to ship from your Lehigh Valley mills into New England after these adjustments became effective?

A. It was less difficult for us to ship in there.

Q. That is, the rates enabled you to go further away from the mill?

A. That is right. It overcame a lot of the troubles we had been having.

Q. Now, was that also the general effect of the adjustments which had been made in the trunk line territory which affected the Lehigh Valley?

A. Yes.

Q. Now, leaving that section, Mr. Browder, I would like to direct your attention to the rate situation in the Southeast.

What is the general freight rate structure applying with respect to shipments of cement made by the mills in the Southeastern States?

A. Well, the present adjustment there was one
38095 that was fixed by the Interstate Commerce Commission in Docket 15806.

By Mr. Brick:

Q. Will you please explain the condition which existed prior to the time that the Interstate Commerce Commission began that proceeding?

A. In the Southeast prior to 1928 the rates were published on a so-called basing system down there; the rates were published from cement-producing points to certain base points out in the territory and to which were added local rates beyond to get your rates to your final destinations.

Those rates had also grown up with the industry down
38096 there and were unsatisfactory to practically all of the shippers.

After numerous conferences with the railroads to get an adjustment which was satisfactory, it could not be done, and finally a complaint was filed with the Interstate Commerce Commission in 1924. In 1928 the Commission rendered its decision in Docket 15086, which put the rates in the Southeast on a mileage basis.

The short, weak lines in the South were allowed to add an arbitrary of 2 cents a hundred pounds to those rates figured on the standard scale to help them on their financial conditions; also, in the State of Florida an arbitrary was permitted which ran from one-half cent for five miles up to 5½ cents, I believe it was, for about 500 miles.

The Commission's order gave the railroads permission

to group the mills in the Birmingham district, using the actual rate on its distance from each mill out to 100 miles. Beyond that all of the rates were figured on the Birmingham, Ala., distance, which was considered the central point in the group. They also gave the railroads—I might say the railroads availed themselves of that grouping arrangement. They also gave the railroads the privilege of grouping Richard City and Chattanooga, using the average distances from both of the mills in arriving at the rates, but the railroads did not avail themselves of that privilege.

It also established rates from the various south-
38097 eastern ports through which foreign cement had been coming in and which gave the railroads an opportunity of handling the foreign cement on the same basis of rates as was published from the cement mills.

By Mr. Brick:

Q. Prior to the time that the Interstate Commerce Commission took action in 1928, Mr. Browder, did you personally have any experience with the rate situations existing at that time?

A. Yes.

Q. Did your find them satisfactory or unsatisfactory?

A. I found them very unsatisfactory, and in lots of places discriminatory.

Q. And outside of being discriminatory, what did you find the general situation to be?

38098 A. The general situation was that there was a hodge-podge of rates, as I mentioned, in the past, and in New England, and there was no relationship between the rates from one point as against the rates from another.

By Mr. Brick:

Q. Did you find that those rates restricted the points at which you could be competitive with other cement mills?

38099 A. We were not competitive.

Q. Now, after the I.C.C. took action, Mr. Brow-
der, did the railroads avail themselves of any op-
38100 portunities to group while in the southeast?

Q. And explain the effect of the grouping of those mills with respect to rates on shipments from those mills?

A. Beyond the 100-mile distance it made the rates to all points from the Birmingham district the same to points in the Southeast.

Q. Now, Mr. Browder, you have made reference on occasions to mileage scale of rates. What do you mean by that expression?

A. Well, a mileage scale is a basis of rates that is fixed according to the distance that the shipment moves, in those mileage scales, the rate per ton-mile for the short haul is considerably in excess of what it is for the longer hauls, due of course to the terminal charges at each end, such as the switching in of the car, per diem on the car while it is being loaded, switching it back to the train yard, the same thing at the unloading end, and the clerical work in
38101 billing out a shipment is the same on a five-mile haul as it is on a 500-mile haul; and all the mileage scales with which I have ever come in contact, the short-line rates are considerably higher per ton mile than the long-haul rates.

38102 Q. Mr. Browder, I show you Respondents' Exhibit 2896, for identification, and ask you what it is.

A. It is a Rand-McNally of the United States on which has been shown in different colors the different freight association rate territories and the freight classification territories.

Q. And what is the source of that map?

A. This map was taken from the Freight Traffic Red Book, which is published by the Traffic Publishing Company in Chicago and New York.

Q. And what is the basis on which the Freight Association rate territories are set up?

A. They are voluntary associations set up by the railroads for handling their rate matters in those various territories.

By Mr. Brick:

Q. And are these territories recognized by the Interstate Commerce Commission?

A. Yes, frequently referred to in their orders, and so forth.

Q. And are the boundaries and areas indicated on this exhibit recognized by the Interstate Commerce Commission?

38103 A. Yes, they are recognized. They are sometimes extended in certain adjustments. For instance,

I might add here that the Southern Territory here, the Southeastern Territory only takes in the southern part of Virginia, but in the cement adjustment in the South the Interstate Commerce Commission extended that to take in the whole State of Virginia.

Q. Now, what is the relation between the areas indicated on that map and the areas which you have discussed, including Lehigh Valley adjustments and the New England adjustments and the Southeast adjustments?

A. They coincide with this map except for the little part of Virginia that I spoke of just now.

(RESP. EX. 2896 was offered and received in evidence.)

38104 The witness identified Resp. Ex. 2897 as a map of the United States published by the American Map Company containing markings prepared by him. The red markings outline the various rate teritories covering cement adjustments over the whole United States east of the Rockies and show the I. C. C. reference number to each order and the date of the order covering that adjustment. That applies everywhere but in the Eastern Trunk Line territory where the Commission has not fixed the rates. They are railroad made rates. The scale of rates that applies in the respective areas can be determined from the various sections indicated on the map and from the notations.

Mr. Brick: I offer Respondents' Exhibit 2897 in evidence.

Mr. Parlson: Your Honor, at this point we ought to be let in on the secret about these things. It may be a school for the rest of the cement industry that we are

38105 conducting here as regards freight. It may be that Mr. Brick has some issue in mind he is addressing these exhibits to and trying to elicit testimony about, but we do not know, there is no foundation laid for it, and that is the only way you can understand what the thing is about. We cannot guess. We have waited an hour now.

Trial Examiner Norwood: I should like to know just the purpose of that proffer.

Mr. Brick: Well, that is very easily ascertainable from the testimony of the witness. This Exhibit 2897 shows the various areas east of the Rock Mountains in which the different scales of rates set by the Interstate Commerce Commission apply, the docket numbers and the order num-

bers. And the dates when the orders were issued appear, with respect to each of the areas having a different scale of rates. In addition to that—

Trial Examiner Norwood: That is descriptive, but I should like to know why you want to show that. What issue does it bear on?

Mr. Brick: So that when the Government in the future speak of freight absorption and the distances from which mills ship their products we will know accurately
38106 what the freight rate factors are in connection with such shipments. So far the Commission has talked entirely in terms of generalities. They are still at times back to the old Pittsburgh Plus situation, about sending a shipment from Pittsburgh to Duluth, next to the steel mills in Duluth.

Mr. Paulson: Then it goes to the subject of freight absorption, as I understand it?

Mr. Brick: It goes to any subject which those facts apply to, and it is our position that the facts contained in this exhibit are material and relevant and may be used by the Commission or by the Respondents in connection with any document which the Commission determines to use in connection with the issues.

Mr. Paulson: Now, we are right back where we were before. I said the basic things are base point, freight rates, and location of mills. When we have got those, we have got everything. When we get freight rates we do not need this. This does not give us freight rates or anything except some things that some technician can use. Now, get us the freight rates, if he wants to tell about freight absorption, that is what we must know, location of mills, base points, freight rates. We do not want this.

38107 Mr. Paulson: Well, we object to it for all the reasons included in the statements I have just made.

Trial Examiner Norwood: I wish Counsel would make a short direct statement showing sufficiently to enable me to decide whether it is worth receiving or not.

Mr. Brick: As I see it, there is no question at all about its materiality. Here we have prices on a delivered basis for the purpose of getting business, and that the
38108 cost is determined at the place of use. Now, by reason of that, the cost of that freight charge is included in the price for cement, and is a substantial part

of that delivered price. It is interesting to know particularly where the basic charge here, as we understand it, is that there has been a conspiracy to restrain competition in price, what the elements of your price are, and the extent to which those freight factors have a bearing on the conduct of the cement business. It relates to all matters of competition, and to all matters relating to price. This is fundamental. It is probably one of the first things that should have been presented in the case.

Mr. Paulson: For that purpose we need the freight rates. They do not have the freight rates there.

Mr. Brick: The freight rate books are in evidence, and they were offered by the Government. Now, what I say—

Mr. Paulson: That is all we need.

Mr. Brick: Now, there is no need of misleading the Commission on that. What we are showing here is the relative situation between various areas. In one area one scale of rates apply; in another, another scale of rates apply. Now, if the Commission's Counsel and the Examiner will bear with me for a little while I will produce those scale of rates. Now, this is the backbone of

38109 the freight structure east of the Rock Mountains.

Trial Examiner Norwood: As between these sections?

Mr. Brick: Yes, sir. And it shows also what the I. C. C. has done to permit mills to get into certain territories, and what the Commission has done to eliminate discriminations in freight rates which would prevent them from getting into those territories.

Trial Examiner Norwood: It seems to me that it does have a bearing on the competition as between these sections.

38110 Trial Examiner Norwood: I think that this situation might have some bearing on the effects of this, whether cross-hauling is economical or uneconomical.

Trial Examiner Norwood: Now, I will overrule the objection and receive the exhibit.

(RESP. EX. 2897, was offered and received in evidence.)

38113 The witness identified Resp. Ex. 2898 A to P as a document prepared by him and consisting of an historical statement covering the rates on cement in the various territories, so called, the Western Trunk Line

ritory, the Southeastern territory, the Central Freight Association territory, the Trunk Line territory, and the New England territory.

The witness further identified Resp. Ex. 2898 A to P as a statement written by him and prepared in compliance with the basic decisions of the Interstate Commerce Commission and adjustments which were voluntarily published by the railroads.

The witness stated that this explains the various rates which apply to the different areas indicated on Resp. Ex. 2897.

38114 The witness identified Resp. Ex. 2899 as being a statement which he prepared showing the comparison of the basic rate scales for representative distances which are applicable in the various territories east of the Rocky Mountains and prepared from the orders of the Interstate Commerce Commission covering those territories.

The witness stated that he can vouch for the accuracy of Resp. Ex. 2897, being a map, Resp. Ex. 2898 A to P and Resp. Ex. 2899 to the best of his knowledge and ability and that the source of the material and all the matters contained in those various documents are available at the offices of the Interstat Commerce Commission.

38117 Mr. MacIntyre: Respondents' Exhibits 2898 and 2899 are incompetent, irrelevant, and immaterial, and no foundation has been laid for those.

Trial Examiner Norwood: Now, what is the purpose.

38118 Mr. Brick: I have heard lots of Mr. MacIntyre's promises, and I have yet to see one of them fulfilled.

Now, Your Honor has asked me the question, as I take it before Mr. MacIntyre interrupted, as to our purpose in offering Respondents' Exhibit 2898-A to P, and 2899. Well, those two exhibits, together with Respondents' Exhibit 2897, explain completely the various areas where the I. C. C. has applied freight rates on cement, and what scales of rates they have applied, and in cents a hundredweight, which applies with respect to all of these various described areas. Of course, it would take quite a while to have the witness go through the explanation of the various statements contained in these exhibits.

38119 Trial Examiner Norwood: Well, explain to me how this goes to the issues in the case. How does

all this—this shows, as I see it, where the Interstate Commerce Commission has made rates for the different localities, different sections here. Well, now, how is that valuable to us in deciding the issues in this case? What issue does it go to?

Mr. Brick: Well, if Your Honor please, as I stated before, the freight element is a very important factor in connection with cement prices.

Trial Examiner Norwood: You have gone into that.

Mr. Brick: Well, that is it.

Trial Examiner Norwood: What is it about freight?

Mr. Brick: It is related to price and competition, and the extent to which mills may be competitive freightwise, and will prevent the Commission arguing that there is a tremendous amount of freight absorption, that is the point of their objection. If they knew the facts—

38122 By Mr. Brick:

Q. Mr. Browder, in connection with Respondents' Exhibit 2899, that is the one you have in your hand, is it not?

A. That is correct.

Q. What was the basis on which the various rate scales were determined as appearing on that exhibit?

A. The orders of the Interstate Commerce Commission except in the case of the Trunk Line Association, which is the railroad-made rates.

Q. And on what principle, if you know, did the Interstate Commerce Commission act in determining those scales?

A. They were on a mileage basis.

Q. And what is the purpose of the mileage basis?

A. Mr. Brick, I do not know that I can give you an answer,—the Commission's purpose, you mean?

Q. Let me ask it this way: From your experience, do rates worked out on a mileage-scale basis tend to

38123 eliminate discriminations?

A. Yes.

Mr. MacIntyre: I object. It is immaterial in this case.

Mr. MacIntyre: Had the witness answered before the objection was made? If so, I move that the answer be stricken.

Trial Examiner Norwood: The motion is allowed.

Mr. Brick: Well, I offer to prove in that connection that

the principle adopted by the Interstate Commerce Commission in the determination of these various mileage scales appearing on that exhibit included two points; one, reasonable compensation to the railroads; and, two, the elimination of discrimination as among shippers.

38127 Trial Examiner Norwood: I do not think you should pursue that. I ruled that out.

Mr. Brick: I do not know why it was ruled out. The objection was it was incompetent.

Trial Examiner Norwood: Now within his knowledge what the other fellow thought. You cannot put that in.

Mr. Brick: Well, that is the way the Examiner put in evidence for the Commission. I can show you twenty different cases where you asked the witness if he had any doubt as to a situation, and admitted it even though the circumstances were similar to these.

If Your Honor please, I have—

Trial Examiner Norwood: I do not recall those instances.

Mr. Brick: I will be glad to point them out to you. I have here a number of papers—

38128 Trial Examiner Norwood: I think when you make those irresponsible statements that you might refer to the record. This Examiner has not put in any evidence yet.

Mr. Brick: I said that the Examiner has asked witnesses produced by Counsel for the Commission questions along the line, "Have you any doubt as to whether" thus, this, and that, and so forth, is correct, and even though the witness knew nothing about the facts to which he testifies, Your Honor admitted the evidence, both in the form of testimony and documentary evidence.

Trial Examiner Norwood: What evidence was it?

Mr. Brick: I will be glad to cite—

Trial Examiner Norwood: What evidence was it and under what circumstances?

Mr. Brick: I will cite you the record, sir. I will be glad to show it to you in the morning.

Trial Examiner Norwood: I think that you are obligated to cite me the record on those matters.

Mr. Brick: Now, I have here, if Your Honor please, certain papers which I would like to have marked. They come from the files of the Penn-Dixie Company, and they are inter-office communications between salesmen, sales

managers, and other officials of the company concerning the reasons for the action they took with regard to prices based on the Portland Point mill, and I ask that they
38129 be marked as an exhibit.

I am stating what they are because previously Your Honor has asked me to do that before having the papers marked.

Trial Examiner Noorwood: Yes.

Read what he said.

(Statement of Mr. Brick read.)

Trial Examiner Norwood: I do not think it will be necessary to mark them. I will exclude them.

Mr. Brick: Shall I make an offer of proof in the morning?

Trial Examiner Norwood: Yes.

Mr. Paulson: Hasn't he already made an offer of proof? He described those documents? Isn't that sufficient? I do not understand an offer of proof to be anything except a statement by counsel to show the court whether something is relevant to the issues.

Trial Examiner Norwood: He may make his offer of proof there, or he may have them marked. He is entitled to one or the other.

Mr. Paulson: I thought he had already made an offer of proof.

Trial Examiner Norwood: If they are similar papers Counsel evidently recognizes that they were papers which were heretofore excluded.

38130 Mr. Paulson: He said that. Mr. Brick described them and I thought that was his offer of proof.

Mr. Brick: No. I asked to have these papers marked.

Trial Examiner Norwood: Inasmuch as we are about to adjourn, Counsel may have them marked.

(The documents were marked for identification "Respondents' Exhibits 2900-A to 2900-V.")

38131 New York, N. Y.,
Friday, May 3, 1940.

38132 Trial Examiner Norwood: The stipulation is as follows:

It is hereby stipulated and agreed that the witness, D. S. Browder, of Pennsylvania Dixie Cement Corporation (hereinafter referred to as "Penn Dixie") shall be deemed to have given direct testimony in this proceeding,
38133 subject to the same conditions heretofore appearing in the record as agreed on with respect to the stipulated testimony of Charles Horner, record page 36801, as follows:

1. Penn Dixie was incorporated under the laws of the State of Delaware in 1926. The Corporation's principal office is in New York City and it now has sales offices in New York, Boston, Rochester, Philadelphia, Atlanta, Chattanooga and Des Moines.

2. Penn Dixie has cement plants located at Kingsport and Richard City, Tenn.; Clinchfield, Ga., Nazareth, Penn Allen and Bath, Pa.; Portland Point, N. Y.; and West Des Moines, Iowa, formerly known as Valley Junction, Iowa.

3. All of these plants, with the exception of West Des Moines have been a part of the Penn Dixie organization since 1926. The West Des Moines plant was purchased in 1928 under foreclosure sale of the physical properties of the Pyramid Portland Cement Company of Iowa.

4. The annual capacities of Penn-Dixie's plants are as follows:

Kingsport	1,500,000 barrels
Clinchfield	1,100,000 barrels
Richard City	2,400,000 barrels
Nazareth	1,600,000 barrels
Penn Allen	1,200,000 barrels
Bath	2,100,000 barrels
38134 Portland Point	1,100,000 barrels
West Des Moines	1,200,000 barrels

5. The above capacity figures are based on a survey of each plant made by Ford, Bacon & Davis, consulting engineers, at the time each plant was acquired.

6. Prior to 1929, changes were made at the Nazareth and Bath plants which increased the original Ford, Bacon

& Davis figures from 1,300,000 barrels and 1,940,000 barrels per year respectively, to 1,600,000 barrels and 2,100,000 barrels per year, the increases being estimates on Penn Dixie's part. At Richard City, also prior to 1929, two big kilns were added resulting an an estimated increase, according to the kiln manufacturers, of 400,000 barrels per year. This brought the annual capacity figure for that plant up to 2,409,000 barrels.

7. The above capacity figures represent an estimate of the maximum amount of cement each plant can produce without allowing for breakdowns and overhauling, limitations of storage capacity, types of orders to be filled and other contingencies.

8. Penn Dixie manufactures its cement to meet various kinds of tests required by customers. For example, a 10,000 barrel contract may call for a particular bin test. Once the cement has been tested, it is set aside in a sealed bin and delivered as ordered by the customer. The result of this is that that particular storage bin is tied up 38135 until the contract is filled even though there may be but 500 barrels remaining to be delivered. As long as the bin is tied up, Penn Dixie is to that extent deprived of the storage capacity it would otherwise have. Most of the storage bins at all plants are tied up in this fashion at all times. This in turn limits production as cement cannot be manufactured beyond the extent to which it can be shipped upon production or stored.

9. Penn Dixie has never submitted capacity figures of its plants to The Cement Institute nor has it ever submitted those figures to W. S. Mallory, but they have been included in statements to stockholders and advertising literature of the Corporation.

10. All of Penn Dixie's plants, with the exception of Penn Allen, are operating at the present time although all of them have not been operated continuously. Since the use of cement in large quantities is confined to 8 or 9 months in the sales territory served by Penn Dixie, the shipments from its mills for 3 or 4 months of the year are light or negligible and this seasonal factor causes the shutting down of its mills when storage bins are filled to capacity. The Penn Allen plant was out of operation from 1930 to 1936, inclusive, and has operated since 1937 as a grinding and storage plant in the manufacture of Penn Dixie high early strength cement, clinker for which is

burned at Penn Dixie's Bath, Pa., mill, which is about one mile from the Penn Allen plant.

38136 11. Penn Dixie does not operate any silos or warehouses, except that it has a stock interest in a company which operates a silo and warehouse in the District of Columbia and has a subsidiary corporation which operates a warehouse at Miami, Fla. From each of these warehouses Penn Dixie distributes its cement to customers.

12. Penn Dixie is neither a parent nor a subsidiary of any other cement producing company, nor are its officers connected with any other cement producing company.

13. Penn Dixie's Kingsport mill ships into the southern parts of Virginia and West Virginia, all of North Carolina, northeastern Tennessee, eastern Kentucky, and the extreme northwestern part of South Carolina. The Richard City mill ships into all of Tennessee except the northeastern part, western and central Kentucky, northern Georgia, all of Mississippi, Louisiana, and Arkansas and all of Alabama except the southeast corner. The Clinchfield mill ships to all of Florida, the southeast corner of Alabama, the central and southern parts of Georgia, and all of South Carolina except the northwest corner. Penn Dixie's Pennsylvania mills ship into nearly all of New England, all of Delaware, Maryland, and the District of Columbia, eastern Pennsylvania, southeastern New York, and northern Virginia and West Virginia. The Portland Point mill ships into all of New York except the southeastern part, and makes some shipments to western and northern Pennsylvania and to some points in Massa-
38137 chusetts to which its freight rates are lower than those from Penn Dixie's Pennsylvania mills. The West Des Moines mill ships into all of Iowa, the southern and central parts of Minnesota, the southern and western parts of Wisconsin, the western part of Illinois, the northern part of Missouri, and the eastern parts of Kansas and Nebraska. This mill has also made occasional shipments into the eastern part of South Dakota.

14. The shipping territories so set forth for each mill are not constant. Frequently Penn Dixie makes shipments out of one mill that would ordinarily be made from one of its other mills. Any one or a number of factors may give rise to such shipments. Among the reasons for shipments from one Penn Dixie mill into the usual shipping territory of another Penn Dixie mill are the following:

(1) Orders at one plant on a particular day or days in excess of packing and loading facilities at that plant.

(2) Shortage of cars, transportation service, or other facilities at the plant.

(3) Desire to spread temporary high cost at one plant by increasing volume of shipments out of that plant.

(4) Necessity of shutting down a particular mill for repairs or because of a slack period or strike.

(5) Change in freight rates from one mill and not from another so that relative advantage of shipment from
38138 either may have changed.

(6) Preference of customer for cement from a particular mill because of color or texture for particular uses.

(7) Requirement by customer of shipment over a particular railroad that does not serve the mill that would ordinarily ship.

(8) Requirement by customer for cement tested by a particular testing laboratory, such cement not being available at the mill that would ordinarily ship.

(9) Requirement by State authorities for cement produced within the State shipped to a point or points within the State normally served by a mill outside the State.

15. The sales territories served by Penn Dixie's seven sales offices cover in the aggregate the shipping territories of all Penn Dixie mills but coincide with individual mill shipping territories only in the case of the Des Moines office which services the territory of the West Des Moines mill. Otherwise, the sales territory of each office is apart from and cuts across the shipping territories of the other seven mills.

16. Penn Dixie mills compete with all of the other mills located in the States which are wholly or partly in the sales territory of Penn Dixie plus the mills located in Ohio, Indiana, Texas, and Oklahoma.

17. The extent of the sales territory in which
38139 Penn Dixie competes in the sale of cement is influenced by several factors among which are the following:

(1) Whether the mill net realized from a particular area is sufficient to warrant canvassing and working the area.

(2) Whether the demand for cement in a particular area is sufficient to justify the sales expense of traveling the area even though mill net might be satisfactory.

(3) Whether delivery service from its mill is sufficiently comparable with that from competing mills to warrant purchasers in desiring Penn Dixie cement.

18. Penn Dixie solicits all of its sales territory almost constantly and at the present time employs a total of 75 salesmen, each one of whom is assigned to a definite part of the sales territory of the particular sales office out of which he works. The degree of sales solicitation by Penn Dixie in particular areas is influenced by numerous factors with the result that the number of salesmen assigned to each sales office and the total number of salesmen in Penn Dixie's employ is not constant. As demand shifts in the various territories, it is necessary from time to time for Penn Dixie to reduce or add to the number of salesmen in a particular area. At the present time Penn Dixie does not employ a salesman in active solicitation of northwestern Pennsylvania, which it considers a part of its marketing territory and from which it realizes a satisfactory net at its Portland Point mill. By reason of 38140 the delivery advantage some competitors have over Penn Dixie to that area, a Penn Dixie salesman could not sell enough volume to pay his expenses. The same situation obtains in the part of South Dakota to which the West Des Moines mill has made occasional shipments. In Maine, because of lack of volume, the Penn Dixie salesman who formerly traveled that State exclusively, now devotes one third of his time to solicitation of the State of Vermont. For some periods, because of low nets to the Richard City mill, Penn Dixie accepted only cold dealer business in the States of Arkansas and Mississippi. The same situation exists at the present time with respect to other territories such as Vermont, New Hampshire, Louisiana, Arkansas, and Nebraska where Penn Dixie salesmen now solicit on a part time basis.

19. Penn Dixie does not withdraw entirely from markets such as these because it cannot afford to. It has poured great sums of money into their development and prefers to keep up its contacts which it would lose were it to withdraw even for a short time.

20. Within the last 15 years, five new mills, namely, the Lawrence mill at Thomaston, Me., the Green Bag of Pennsylvania mill at Neville Island, Pittsburgh, the Nebraska mill at Louisville, Nebr., the Arkansas mill at Okay Junction, Ark., and the National Portland Cement Company mill

at Brodhead, Pa., have commenced operation and
38141 sold cement in Penn Dixie's sales territory. The effect of the establishment of these mills was not so much toward contraction of Penn Dixie's sales territory, but rather toward increased sales activity on Penn Dixie's part. With the increase in sellers, Penn Dixie in many places sold less cement.

21. Penn Dixie has found that some mills within its marketing area have stopped production. This situation, however, is likely to change from month to month. The Lehigh mill at Bath, Pa.; the Vulcanite mill at Phillipsburg, N. J., and the Georgia Cement & Stone Company plant at Portland, Ga., are mills located in Penn Dixie's marketing area that are currently not in operation.

22. Penn Dixie has always shifted its sales effort to conform with the constantly changing demand at the many points in its sales territory. Building, road, bridge, and other large construction operations require large volumes of cement and such operations fluctuate greatly from year to year and bring about a shifting in demand not only as between cities and counties, but as between States and other large areas.

23. It is Penn Dixie's policy to quote and sell at delivered prices with the exception of certain sales to the Federal Government and to railroads. The reason for this policy is that Penn Dixie's customers compare the costs of competing brands at the point of use, and want a price at that point, and Penn Dixie must be competitive at
38142 that point in order to get any business.

24. Penn Dixie has a general policy, except in unusual circumstances, of charging all customers of the same class at the same place the same price at a given time. The price which Penn Dixie quotes in any particular market is dependent upon the competitive conditions in that market. Penn Dixie cannot sell at prices which are higher than those. It endeavors not to quote higher than the current market price at any destination. Penn Dixie always at least tries to meet the lowest price of any of its competitors.

25. In some marketing areas Penn Dixie has found it advantageous to have a so-called price base at its mills. In such cases it quotes prices which are the equivalent of its price base and freight to destination. However, at all points where such a price is not lower or as low as any

competitor's price, Penn Dixie meets and quotes the lowest competitor's price it finds at such points if it is interested in soliciting the prospective business at these points. Penn Dixie has had and now has price bases at its Clinchfield, Kingsport, and Richard City mills, and, with the exception of a small area around the mills, from its three Pennsylvania mills. It also in the past had a price base at its Portland Point mill. The status of each mill and the price base at each mill depends upon the competitive conditions existing in that particular mill's particular territory
38143 and upon the costs and other conditions peculiar to that mill.

26. Penn Dixie sends out written quotations whenever it changes its prices as that is the only means it has of informing its customers promptly of its new prices.

27. When Penn Dixie initiates a price change, it merely sends out written quotations to customers at all points where it changes or seeks to change the current market price.

28. When Penn Dixie learns of new prices being quoted by some competitors at various points in the field, it endeavors to ascertain by deduction of freight whether the new prices reflect a change in the price base at some mill. If it finds that they do, Penn Dixie then anticipates the points at which the new prices might be effective. It does this by adding to the new price base freight from the mill to all destinations in a wide area surrounding the mill and by making the same calculations with respect to other price bases it has ascertained to be currently reflected. Penn Dixie then assumes that prices have been affected at all points where the combination of the new base figure, plus freight, or of some other base figure that it has ascertained previously, plus freight, is different from the market price which had existed at those points. If the new prices at those points are higher than the prices Penn Dixie has been quoting, and Penn Dixie elects to follow these new prices, it sends out written quotations to all of these points quoting the new prices. If the new prices are lower,
38144 Penn Dixie has no such choice as it cannot sell at any price not as low as the lowest price of all its competitors. It sends out written quotations meeting the new lower prices at all points or at such points where it elects to continue the solicitation of business. In every case where Penn Dixie finds that its new quotation is not as low

as any quotation of a competetor for the same point, and it is interested in selling at that point, Penn Dixie sends out a new quotation meeting that competitor's quotation.

29. In no instance has Penn Dixie any assurance that the delivered prices it quotes in this manner will be the lowest prices at the points involved, nor has it any agreement or understanding with any other company that it or they will use such a method of ascertaining and quoting prices, or that any particular mill will, or will not, be a so-called price base mill, or continue its status as a base or non-base mill. It has been this witness' experience that prices at most destinations within his company's marketing territory have reflected the price bases of different mills at different times.

30. It does not always happen that market prices Penn Dixie meets in the field reflect a price base at some mill. In such cases Penn Dixie sends out its quotations meeting the prices actually found in the field. Between 1932 and 1938, of the total shipments made by Penn Dixie, 20 to 60 percent of such annual shipments were made at 38145 prices which did not reflect any mill base.

31. Penn Dixie supplies to members of its own organization copies of the lists of price bases it has found to be reflected in prices quoted in its sales territory. If necessary, as price changes are discovered in the field, and Penn Dixie sends out its quotations meeting these changes, it corrects its lists of price bases in pencil for the office record. Several days after this has been done and its quotations have been mailed out, if Penn Dixie finds that the new prices have remained effective it mimeographs the revised list and distributes it within its organization. Penn Dixie has received and granted an occasional request from some competitor for a copy of its list after prices reflecting the price bases listed have become effective. Penn Dixie has never received a list of price bases from any competitor.

32. Penn Dixie obtains its information as to competitors' price quotations by means of information picked up in the field and reported by its salesmen who are visiting and selling cement to dealers and other customers or prospective customers every day. Penn Dixie's salesmen operate under instructions to report immediately any changes in competitive practices or prices that come to their attention in the field and to send in actual competitive quotations picked up wherever possible. Penn Dixie's salesmen

are not authorized to meet changes they find in the
38146 field until they have received authorization to do so from the home office.

33. In addition to its salesmen as a source of price information, Penn Dixie has approximately three thousand dealer customers and many of them on their own initiative always inform Penn Dixie of any price quoted which is lower than the quotation Penn Dixie has given him and often inform Penn Dixie of any higher price being quoted. These dealer customers frequently send in to Penn Dixie's sales offices the actual quotations received from competing producers. Other sources of information from which Penn Dixie derives information as to prices quoted by competitors are tabulations of bids submitted to governmental bodies, State and federal, and, occasionally, commodity prices published in newspapers and trade journals. Other than these sources, Penn Dixie has no other source of information as to competitive prices.

34. If a change in competitive prices or policies takes place, Penn Dixie begins to hear of that change from its salesmen and dealers almost immediately after competitive announcements are received by dealers. The question of the number of dealers or salesmen who report price changes to Penn Dixie before Penn Dixie concludes that there has been a general price change in a given area is never of any particular consequence because so many of them do report as soon as there is a change. Within a few hours after the announcement of the change in the price field, Penn Dixie has information from many dealers and
salesmen in the territory where the change has been
38147 effected. Sometimes as many as forty or fifty dealers have telephoned the information in when the change is announced; sometimes, many more. Information comes in from the field automatically and reflects the different changes as they occur. Penn Dixie takes action accordingly, sometimes meeting the changes and sometimes not.

35. When the Penn Dixie mill is located on a customer railroad's tracks, Penn Dixie quotes the railroad f.o.b. their tracks the lowest price base obtaining at any mill on their tracks. When Penn Dixie's mill is not located on the railroad calling for a quotation, Penn Dixie quotes the railroad f.o.b. the nearest point on their line to its mill, the lowest price base at any mill located on the railroad

line. When no mill is located on the line of the railroad requesting a quotation, Penn Dixie quotes the railroad f.o.b. the nearest point on the line to the Penn Dixie mill the lowest delivered price at any point along the line.

36. Of Penn Dixie's so-called base mills, the Richard City mill is on the N. C. & St. L. Railroad, the Kingsport mill is on the Clinchfield Railroad and the Clinchfield mill is on the G. S. & F. Railroad. The price bases at these mills are the lowest price bases obtaining at any mill along the tracks of those railroads. Penn Dixie, therefore, quotes those railroads the Richard City, Kingsport and Clinchfield bases, respectively, f.o.b. their tracks Richard
38148 City, Kingsport and Clinchfield.

37. It is Penn Dixie's policy with regard to all Government work, both State and Federal, to quote prices equivalent to the commercial market prices at the particular destinations involved. Exceptions to this policy have been Penn Dixie's prices on T. V. A. work after October, 1934, numerous f.o.b. mill bids to the Federal Government, and, in effect, every price quoted to the Federal Government where land grant rates are involved. In the latter case, Penn Dixie quotes in such manner that the Federal Government can take title to the cement at mill and thus secure the benefit of any land grant rate that may apply.

38. Penn Dixie does not ordinarily give special prices on such sales as it is in a wholesale business and gives all customers the benefit of a wholesale price without discrimination and does not feel that the governmental agencies, State or federal, which, together over the last ten years, have taken an average of only about 2.5 percent of Penn Dixie's total shipments, are entitled to any special discount. Penn Dixie has found that its sales expenses in connection with sales to governmental agencies has always been at least as high as that involved in ordinary commercial sales and in a great many cases, higher, and that its manufacturing costs in connection with sales to governmental agencies have been greater by reason of special
38149 specifications called for, special bin facilities required, more exacting requirements for laboratory testing, and numerous other factors. Moreover, Penn Dixie has found that governmental business is not of a repeat nature and does not result in Penn Dixie's having a customer upon whom it can depend for year in and year out trade.

39. Penn Dixie has not made deliveries to customers' trucks at any of its plants since 1932. Prior to that date there was a period at each plant during which a very small percentage of its total shipments was in the form of deliveries to customers' trucks.

40. Penn Dixie found deliveries to customers' trucks at its plants objectionable for numerous reasons. Chief among these was the fact that deliveries to customers' trucks constituted retail business. Penn Dixie has always been a wholesaler, the carload being its unit of sale, and none of its plants has been equipped to supply trucking business without considerable extra expense, inconvenience and difficulty. Some of the inconveniences and difficulties involved were the following:

(1) The loading facilities of none of Penn Dixie's plants were designed to accommodate trucks. It was difficult and impracticable to bring trucks close to the packing machines because of intervening railroad tracks. The result was disruption of normal carloading operations and increased loading costs.

38150

(2) Trucking disorganized packing and shipping schedules because trucks came at irregular times, arriving at the plants at almost any hour, day or night. Loading crews had to be available at all times with consequent increase in cost to Penn Dixie.

(3) Amounts of cement called for were invariably small. This meant multiplication of invoicing and bookkeeping greatly in excess of that necessary in normal wholesale business.

(4) Penn Dixie had no facilities at its plants for handling payments or checking the credit status of people calling at the plants with trucks.

(5) The trucking was carried on to a large extent by truckers who were not regularly engaged in the sale of cement or other building materials. Responsible and established dealer customers complained to Penn Dixie that these trucks were underselling them in their own towns. Penn Dixie was thus taxed to retain the good will of many of its best and most substantial customers.

41. Because of all of these factors, when Penn Dixie discovered from quotations picked up in the field that some of its competitors in the Northwest had adopted a policy of charging a 15-cent differential for deliveries to customers' trucks at their mills, it was glad to and did fol-

38151 low that policy. Penn Dixie first adopted this practice late in 1929 at its Pennsylvania mills and its Portland Point mill. Experience with the additional charge at the Pennsylvania and Portland Point mills demonstrated to Penn Dixie that the 15-cent additional charge compensated, at least in part, for the inconvenience and extra expense involved, and Penn Dixie decided to extend the practice to Richard City and Clinchfield. This was done in May, 1931. Penn Dixie never instituted this practice at Kingsport or at West Des Moines.

42. Penn Dixie discontinued making deliveries to customers' trucks at its various mills on the following dates: April 9, 1932—West Des Moines; July 31, 1932—Richard City, Kingsport, and Clinchfield; and August 3, 1932—Nazareth, Penn Allen, Bath and Portland Point. Its decision to discontinue making such deliveries in the case of each plant was brought about by the factors enumerated above. With respect to its Pennsylvania and Portland Point mills, Penn Dixie sent out its announcements of discontinuance after it had learned from the field that competitors had broadcast announcements to discontinue trucking. With respect to its other mills, Penn Dixie took the initiative.

43. None of Penn Dixie's policies or practices with respect to deliveries to customers' trucks have ever been the result of agreement or understanding with any of its competitors or with any dealers, dealer associations or
38152 railroads, nor was the discontinuance of trucking by Penn Dixie the result of any such agreement.

44. Penn Dixie has been making a small percentage of its deliveries from its Portland Point plant since October, 1937, in trucks engaged by it under contract.

45. During the month of September, 1937, information from the field indicated that the Huron Company had extended trucking operations from its Oswego plant to include the northern part of Cayuga County and all of Oswego, Wayne, and Jefferson Counties and at the same time had reduced its truck delivered prices, which had theretofore been 5 cents higher, to equal rail delivered prices. Late in the month of September, Penn Dixie learned from the field that the Alpha Company was meeting this competition from its Jamesville plant. Penn Dixie did meet this competition.

46. Penn Dixie extended its trucking operation to

Lewis County, New York, when it discovered from the field that Hairon had so extended its service.

47. Penn Dixie has contracted with the Driscoll Trucking Corporation for the trucks in which deliveries are made to these counties. Except for some of the short hauls for which rail rates and contract truck rates are the same, Penn Dixie finds that the truck rates it pays are considerably higher than rail rates from Portland Point. The trucking rates it pays are those filed by the truckers with the New York State Public Service Commission in
38153 accordance with the laws of the State of New York.

48. Since February, 1938, it has been required by law that interstate truck rates be filed with the I.C.C. All of the States in which Penn Dixie mills are located require that trucking tariffs be filed with the State Public Service Commissions. The result of such requirements has been that charges for trucking cement have been materially increased.

49. Prior to the summer of 1929, Penn Dixie made some deliveries in hired trucks from its Pennsylvania plants to nearby points. With the exception of very few points, it found that the transportation cost of such shipments were greater than the cost by rail.

50. Disregarding the fact that the truck rates it pays for deliveries from Portland Point today are higher than the rail rates, Penn Dixie finds its costs f.o.b. trucks at mill, to be higher than its costs f.o.b. cars at mill for delivery to any destination in these counties. The Portland Point plan was and is designed for carloading and its physical set-up is such that extra expense is involved in the loading of trucks at the plant.

51. Penn Dixie does not ship by truck to points in counties intervening between its Portland Point mill and the five counties to which it does make such shipments.
The reason for this is that it does not encounter
38154 competition of that sort outside of the northern part of Cayuga County, and Oswego, Wayne, Jefferson and Lewis counties. Since it costs Penn Dixie more to make truck deliveries than to deliver its cement by rail, it prefers not to deliver by truck other than to points to which it must in order to meet competition.

I move to strike paragraph 2,—these are numbered paragraphs,—paragraph 2 in that it is a duplication of the record; paragraph 6 is immaterial, and duplication; para-

graph 8 for the same reasons; paragraph 14, as immaterial detail; paragraphs 44, 45, 46, 47, 48, 50, and 51 as immaterial and irrelevant in that they deal with practices of the company that have been initiated and indulged in since the issuance of the complaint in this case.

Mr. McIntyre: We also move to strike paragraph 49 for the reason that it is immaterial and irrelevant
38155 since it deals merely with the hiring of trucks by the company and does not meet issues raised by paragraph 7, subparagraph (b), of the complaint.

And a further general objection to the entire matters contained in this stipulated testimony, they do not materially add to the record in view of the state of the record as it now stands. It merely takes up space in the record and adds to the expense of the Government and of the Respondents.

A further objection is that the witness has not been qualified, and no foundation has been laid to show that he could serve as a competent witness to give us testimony on many of the matters set forth here. However, that does not alter the fact we stipulated that if he were permitted to testify on the matters he would testify as the stipulation set forth.

38156 Trial Examiner Norwood: Now, with respect to this pending proffer here, I have read it, that is Respondents' Exhibits 2898-A to P, and 2899. I have not had the opportunity to read the record, and I should like to just retain those over the week end.

Mr. Brick: We have no objection to that.

Trial Examiner Norwood: As I study the document, itself, I cannot see that it is relevant in any particular, but I want to study the statements made concerning it before taking any further action on that line.

D. S. BROWDER thereupon resumed the stand and testified further as follows:

Direct Examination (resumed) by Mr. Brick.

38157 Q. Mr. Browder, is the Penn-Dixie Company a subscriber to the Institute freight rate books?

A. Yes.

Q. When did it first subscribe?

A. Since they were first issued by the Institute in '30.

Q. And do you know whether the Penn-Dixie Company

freight rate books prior to the time that it subscribed for the Institute freight rate books?

A. Yes, we did.

Q. And where did it get those books?

A. At one time they got some of the books from the Nazareth Traffic Bureau and later on from the National Traffic Bureau, of Washington, which was run by Mr. Walter S. Young.

Q. Did you have any personal experience in connection with the service offered by the Young Bureau?

A. Yes.

Q. Did you find that the Young service did or did not fill your requirements, as far as freight rate information was concerned?

38159 A. It did not.

Q. In what respects did it not meet your requirements, Mr. Browder?

A. Well, it took too great a time for the Young Bureau to get the rate information. We secured very few rate books from them, and those that we did secure were not properly kept up.

Q. If you know, for how long a period did the Young Service continue?

A. About eight or nine months, I believe.

Q. And in what year was that, Mr. Browder?

A. That was in 1929 and part of 1930, the early
38160 part of 1930.

Q. Did the Alpha Company subscribe to the service?

A. Yes.

Q. Were you with Alpha at that time?

A. That is correct.

Q. Now, in what way, if any, Mr. Browder, did you attempt to overcome the deficiencies of the Young Service?

A. By keeping up books, myself, as far as I could.

Q. Did you take any part in the preparation of the original Institute rate books?

A. I did.

Q. Explain your participation, please, in that connection.

A. Well, in issuing the cement rate books, Mr. E. S. Gubernator, who is general traffic manager of the Lehigh Cement Company, was chairman of the committee that was appointed to handle the publication of those books, or

the issuance of those books, and I was made a sub-chairman for the issuance of the rate books in the South. The rate books in the South were then being kept up by the various individual companies, and I arranged with the various cement traffic men in those companies to check all of the rates in at least one rate book, and all of that was done and turned over to me to have the books printed, and I had those books printed in the South under the name of The Cement Institute, and turned the first book over to them complete for them to keep up and issue
38161 the necessary changes in rates as came out in the future, which they did.

Q. When was this work done, Mr. Browder?

A. In 1930,—in the summer of 1930.

Q. Did your company personally check these books before they were formally issued to the members?

A. No, except in the way that I mentioned just now. For instance, I personally checked one book, the Georgia rate book, and the other companies' traffic representatives checked the books that they were assigned to check.

Q. So that before they were issued all of the books were checked with respect to accuracy and conforming with the tariffs?

A. That is correct.

Q. Now, in preparing those books was any effort made to confine the points of origin to base mills?

A. No. All of the origin mills were entered in the books that it was thought could possibly ship into the territories.

38162 By Mr. Brick:

Q. Mr. Browder, I show you Commission's Exhibit 1139-2-V, and ask you if you are familiar with that letter, or if you received it (handing the document to the witness)?

A. Yes, sir. This is a copy of a letter, dated July 18, 1930, addressed to me by Mr. E. S. Gubernator.

Q. I would like to refer to that portion of the letter, Mr. Browder, which states: "The southern rates being practically all in one tariff the most important data to him is the rate, and if not a specifically published rate the basing point governing."

Did you notice that part of the letter, Mr. Browder?

A. Yes, sir; that is in here.

Q. Did you reply to the letter, Mr. Browder?

A. Yes, sir, I did.

38163 Q. I show you Commission's Exhibit, for identification, 1139-2-Y, and ask you if that is your reply?

A. Yes, that is the reply to this letter.

38164 (RESP. EX. 2901 was offered and received in evidence.)

By Mr. Brick:

Q. Mr. Browder, now, with respect to Commission's Exhibit 1139-2-V, which was Mr. Gubernator's letter of July 18th, and in which he made reference to governing basing points; that is correct, is it?

A. That is correct.

Q. In replying to that letter, what did you construe "governing basing points" to be?

A. The rate basing point as covered in the tariff issued by the Southern Railroad, known as the Southern Basing Book.

Q. Now, will you explain what these rate bases are?

A. Well, the rates, as published by the railroads under the order of the Interstate Commerce Commission, in Docket 15806, are published only to specific rate basing points, which were located about 25 miles apart along the railroad. In connection with those rates they issued another tariff, which was called the Southern Bases Book, which carried an alphabetical and a geographical list of all stations in the South, and showed opposite each station the rate basing point covering that station. In many cases there were as many as forty or fifty points governed by one basing point; that is, the rate basing point. For

38165 instance, Atlanta, Ga., probably governed rates at forty or fifty stations; some of the others only two or three, sometimes ten or twelve.

38166 Q. Now, Mr. Browder, from Mr. Gubernator's letter did you know the reason why he wanted the data which he requested?

A. Yes.

Q. And in reply to it, and acting on his letter, what did you understand the reasons to be?

A. I understood that Mr. Gubernator wanted me to send my work sheets showing all of the information relative to the rate basing point to The Cement Institute Bureau to save that work in preparing a similar state-

ment which they would have to do to keep the books properly corrected up with the various rate changes that would occur in the future.

38167 By Mr. Brick:

Q. And did those work sheets have anything at all to do with the cement prices?

A. Not at all. They were just rate sheets for working up the rate book.

Q. Now, you mentioned a basing book which was used there in the Southeast. Do any actual rates appearing in that basing book?

A. No. There is no rate in the basing book at all. It just gives you the information as to the base point applicable to each of the stations involved.

Trial Examiner Norwood: And you were referring to those basing points, as indicated by that map, that is, the rate basing points?

The Witness: Judge, the rate basing points are not shown on any map that I have seen so far.

Trial Examiner Norwood: They are not indicated by those maps?

The Witness: No.

Trial Examiner Norwood: The territories in which they are situated?

The Witness: The territory is indicated on the map, but the basing point—

Trial Examiner Norwood: That does not show on the map?

38168 The Witness: That does not show on the map.

Trial Examiner Norwood: Thank you.

By Mr. Brick:

Q. Was it the purpose, or was it not the purpose, Mr. Browder, to include in the first freight rate books issued by the Institute all of the cement mills as points of origin?

A. All of the mills that could possibly ship in there. In the Georgian book that I prepared, I included 22 points of origin.

Q. What do you mean by shipping into "there," Mr. Browder?

A. That could ship into the territory covered by that rate book. In other words, the Georgia book included 22 points of origin, if I recall correctly, as the mills which might possibly ship into the State of Georgia.

Q. And the Georgia book included the rates to points in Georgia?

A. That is correct.

Q. Did those points of origin include many mills outside of Georgia?

A. Oh, all but three of those were outside of Georgia. Nineteen of them would have been outside of Georgia, and it also included rates from the southern ports where the rates had been ordered in by the Interstate Commerce Commission.

Q. Now, do the Institute freight rate books include points of origin at which points there are no cement mills?

38169 A. Certain of the books do, yes.

Q. And describe the points of origin referred to in the freight rate books at which there are no mills?

A. They are the ports of entry where rates are published from such port, and foreign cement, and where foreign cement entered, as, for instance, along the South Atlantic and Gulf Coast.

Q. Have you from time to time ever made any requests of the Institute that it include additional headline points?

A. Yes, we have done that.

Q. Has there ever been a case where your request was not honored?

A. No.

Q. Are you free to have whatever headline points in the Institute freight rate books which you want to use?

A. I understand so, yes.

Q. Now, you mentioned, Mr. Browder, the other points of origin in these Institute freight rate books which were along various seacoast ports, and at which ports there were no mills. Will you explain what use, if any, you made of the freight rates from those points?

A. The freight rates from the South Atlantic and Gulf ports were used in connection with the foreign cement which was entering those ports, and in connection with the base prices which we established at certain of

38170 those ports in October, 1936.

Q. Had you mentioned that you used the freight rates of the Institute book, which rates covered the shipments from the ports inland; is that correct?

A. That is correct.

Q. Now, what use did you make of those rates,—what were the mechanics of the situation?

A. We used those rates by adding them to the base prices which we established at the ports to meet the foreign competition, and arrived at our destination prices at interior points along the Coast by the use of those rates.

Q. And did you have occasion to use those rates with respect to foreign cement being delivered inland?

A. Yes. In other words, we use those rates in connection with the meeting of foreign competition, and we would find foreign cement selling at points in the interior, we could figure back with those rates to the prices they were charging at the ports.

38173 Q. And in that manner were you also able to determine the approximate distance which the imported cement might be shipped into the inland?

A. Well, I do not know that we established the distance by the rates. Of course, we knew where the cement was being delivered, and we knew the distance from the port to those points, but not by the use of the rates.

Q. Now, in meeting the competition of imported cement, is it or is it not necessary to know the destination cost of imported cement at interior points?

A. Yes.

38174 Q. Mr. Browder, I think you have stated that you have had experience with regard to the market conditions existing at points where imported cement has been sold; is that correct?

A. That is correct.

Q. Have you ever had occasion to analyze in any way the prices at which imported cement has been sold at such points?

A. Many times.

Q. Will you tell us, please, what you have found, if anything, with regard to any practice which has or which has not appeared to you with regard to your analyses?

38175 A. I have found in analyzing many of the quotations that we have found on foreign cement, and our experience with it, that in a large number of cases the cement was sold f.o.b. the ports and trucked into the interior, and not moved by rail at all.

By Mr. Brick:

Q. Now, what has the practice been with regard to shipments out of Wilmington?

A. Most of the shipments that I investigated out of Wilmington moved all rail.

38177 Q. With regard to shipments out of Savannah, what conditions did you find in your analysis of the prices on those imported cement shipments from Savannah inland?

A. I found that the prices on cement inland out
38178 of Savannah were prices at the port plus the trucking rates of naval stores and cotton trucks returning from the ports after delivering their shipments there.

38182 Q. In connection with these analyses, Mr. Browder, where you find that the importer has used a port base, do you or do you not use the Institute freight rate books in endeavoring to ascertain what the price of that importer might be in the interior?

A. Yes, sir; we use the freight rate.

Q. What is the difference, if any, Mr. Browder, between the use of mills as points of origin and ports as points of origin in analyzing delivered prices?

38183 A. None.

Trial Examiner Norwood: When you find the price, then you apply the freight the same way that you apply the freight from a basing point somewhere, and also apply it from a port, to find out both ways, to get the—.

The Witness: When we are analyzing a price we find in the field, we will figure—use the freight rate book and figure back to the mill and to the ports in the same way.

Trial Examiner Norwood: Yes.

By Mr. Brick:

Q. Now, is there any difference between your use of the Institute freight rate books in connection with the analyses of prices of imported cement, on the one hand, and the analyses of prices of domestic cement on the other hand?

A. No, we do it in the same way.

Q. What machinery, Mr. Browder, did the Institute set up for the purpose of keeping freight rate books up to date?

A. Well, originally, they set up three bureaus, one in

Nazareth, Pa., one in Chicago, and one in Kansas City to issue and keep up the freight rate books.

38184 Q. Now, you have mentioned your familiarity with other freight rate services, Mr. Browder. Will you state whether or not you found the Institute service more or less satisfactory than many of the other services?

A. It was a great deal more satisfactory.

Q. In what respect?

A. That the books were—we felt the books were more reliable and that they were promptly corrected, as freight rates were changed; that the Institute's rate books carried more points of origin than the other bureaus formerly carried. I think that is about all.

38185 Q. Have the Institute freight rate books been revised from time to time, Mr. Browder?

A. They have been revised and re-issued from time to time.

Q. And what was the purpose of revisions and additional issues?

A. Well, correction notices, so-called—correction
38186 notices were issued from time to time as the railroads revised their rates from time to time, and as the books became increasingly marked up with these corrections, they would be re-issued, just to give you a fresh clear book.

Q. For what territory, Mr. Browder, do you use Institute freight rate books?

A. For all of the territory we serve.

Q. Mr. Browder, who, in the Penn-Dixie organization, uses the freight rate books?

A. The traffic department uses them; the sales department uses them, and the shipping department uses them.

Q. What use does the sales office make of the books?

A. The sales office uses the freight rate books in calculating the delivered prices where we have established price bases at our mill. They use them in analyzing the prices that they pick up in the field.

Q. Those are competitors' prices?

A. That is right, and, of course, I might add that
38187 they are used in sending out their quotations in meeting competitors' prices.

38188 Q. Mr. Browder, have you ever made analyses of competitors' prices without using some form of freight rate book?

A. No.

Q. Why haven't you?

A. There is nobody in our sales department who can use the freight tariff.

Q. Have you ever attempted to get out quotations at the time of a price change, whether made by your company or a price change of a competitor, which your company was meeting without using some form of freight rate book?

A. No.

Q. Would it be possible for you to do it in your sales organization?

38189 The Witness: The sales department could call on the traffic department to work up the rates that they desire, but it would take days or weeks or a month, depending upon the territory involved for the traffic department to work them up from the tariffs. It could be done, but not on a day's notice, as we do it at the present time.

By Mr. Brick:

Q. After the freight department compiled such a list of freight rates, would there be any difference between that compilation of freight rates and the freight rates that appeared in the Institute freight rate books?

A. No.

Q. From your experience as a traffic man, and as a sales manager, how long would you estimate it would take a traffic department to work up the rates which would be required by the Penn-Dixie sales office in sending out new quotations to all of its customers?

38190 The Witness: The best answer I can make to that is the actual experience that I have had.

By Mr. Brick:

Q. Will you tell us what that is, please?

A. In working up rates to the South, in the South, that I started working up ten rate books in February, and only took towns of 500 inhabitants, or more, and in the ten southeastern States I had not finished that job until November.

Q. How many months was that?

A. That was nine months, and that was not the complete rate book, and was only one of the territories.

Q. And have you any idea how long it might have taken you to have covered that same territory had you in-

38191 cluded all of the rail stations rather than only those points at which there were 500 or more inhabitants?

A. It would have certainly taken me twice as long, or more.

38192 Q. Mr. Browder, when the orders are sent from the sales office to the mill, what does the order show?

A. Well, of course, it shows the customer's name and address and the point at which he wants the shipment, and the order has been passed into the traffic department and contains the full routing that the shipment is to be moved over, and the rates, together with the number of barrels, and whether cloth, paper and so forth.

38193 Q. And does it include price?

A. It includes the price; that is right.

Q. And that is the price at the destination?

A. That is right; includes destination price.

Trial Examiner Norwood: Now, you are speaking of all orders containing the routings?

The Witness: All of our orders contain the routings; yes, sir.

Trial Examiner Norwood: That is, the routing is put in by the customer?

The Witness: No; it is put in by us. We try to follow the customer's request, so far as we can.

By Mr. Brick:

Q. Well, pursuing that a little further, Mr. Browder, what papers does the shipping office make up in connection with each order?

A. Do you mean there, in, the sales department?

Q. Yes. What papers are made up?

A. He makes up an order form; when he receives the customer's order, he makes up an order form, just our own form, which includes all of the information I have stated.

Q. And who makes up the invoices and bills of lading?

A. The bills of lading are made up by the shipping department and the invoices are made up by the accounting department, each of which, of course, get a copy of

38194 this order that is sent from the sales department. It is made up in quadruplicate.

Q. Now, what use does the shipping department make of the rate books?

A. The shipping department uses the rate books to secure the lowest rate that is applicable from our mill to the destination involved.

Q. Will you give us an example of the manner in which the shipping department uses the freight rate book—that

is, take, for instance, one of your mills at some destination point and tell us just what the shipping department does in connection with rate books?

A. Well, the shipping department, when they get the order, the sales department has already shown the rate in there, but they take the—check that rate with The Cement Institute rate book, which shows the lowest rate applicable. Now, when they go to fill out the—complete the order and get the routing in there—it is necessary to refer to the railroad tariff, and the reason for using the freight rate book is that it saves time in checking all of the routes shown in the tariff. In other words, when the shipping clerk has selected the route he wants to use, he looks up that rate in the rate book, and then when he checks his rate in the tariff for that routing, if it is the same with the rate book, he knows that is the lowest one, and he can use it.

38195 Q. Well, do you find many cases where there are alternative routes for shipments?

A. Oh, there are alternative routes for practically every destination except the local stations on the line which your mill is located on.

Q. And how many possible routes are there on the average with regard to your shipments?

A. That would vary in different territories.

Q. Well, suppose you explain the territory situation.

A. Well, in the East, I will say that the average number of routes available is two; in the South it would probably be six or eight; in the West, about four would be the average.

Trial Examiner Norwood: That would increase with the distance, wouldn't it?

The Witness: It would increase with the distance; yes, sir; but I would say that would be the average for all hauls.

By Mr. Brick:

Q. And by using the Institute freight rate books in connection with the determination of the routing instructions which are placed on your bill of lading, how much time does the traffic department save over the time which would be required to get that information if it did not use the Institute freight rate book?

A. Well, in the East, I should say—I would say
38196 they save half the time, those two routes; in the South, they save five-sixths of the time, about six

routes; and in the West they save about three-quarters of the time, because it is four routes, on the average; that is, on the average.

Q. Well, assuing, Mr. Browder, that the traffic man did not find the lowest rate in connection with the routing which you first investigate. In that case would he continue going on checking other routings until he found the one which would give him the lowest rate?

A. That is right. He would try to ship by the route giving us that lowest rate. If the route he selected is a higher rate, he would try to use another route, if it was at all possible.

Q. And as a matter of practice, do you usually find the routing which carries the lowest rate on your first investigation?

A. As a usual practice, yes.

Q. That would be if you used the Institute freight rate book so that you knew what the lowest rate would be?

38197 A. I said yes.

Q. Mr. Browder, I think in response to one of the Examiner's questions you testified that the Penn-Dixie Company, as a matter of practice, always include the rate and the routing on its bills of lading.

A. That is correct.

Q. Is it necessary to do it in order to have the shipments arrive at the appropriate destinations?

A. It is not necessary, but we found it very desirable.

Q. Well, do the railroads compel it?

A. No.

Q. What does the railroad require, as far as the extent of information is concerned?

A. Nothing but the consignee's name and the destination is all they require.

Q. Now, why do you enter the routing on your bills of lading?

A. Well, there are several reasons for that. One of them is that we frequently want to stop a shipment, as when an order is canceled, or held up, or to change the destination, why, we know right where to go and catch the car, or whether it has passed the point where we can catch

38198 it. Another reason is that we are frequently called upon, in fact every day by customers, to rush and trace certain cars. Now, if we just turn them over to the railroads without routing them, sent them out of the mill

by whatever route they see fit, it would take us a considerable length of time to find out what route they had used, or whether the shipment passed by certain junctions. Once we have already specified the routing, we know about, according to the time it takes, about where the car ought to be, and we can check this junction point, and the next junction point, and find right where the car is, and rush it along.

Q. Now, how would the railroad handle the shipment if you did not enter the rate and the routing on the bill of lading, or enter one or the other?

A. In routing the shipment, they would forward it by the route that gave them the greatest revenue.

Q. Well, now, that would be in the case where you had neither the route nor the rate.

A. That is correct.

Q. And suppose you gave them a rate without a route.

A. Then, they could forward it by any route that 38189 they desired over which that rate inserted in the bill of lading was applicable.

Q. And what would be the case where you included the routing but not the rate?

A. They would forward it via that route specified in the bill of lading, and charge us the rate that was applicable via that route whether it was the highest or the lowest.

Q. Do you ever have a case where you include both the rate and the routing, as you do, and turn the bill of lading over to the wrong railroad, that is, at your mill?

A. I do not recall that we have done that.

Q. But you do have mills which are served by more than one railroad?

A. That is correct. We have three mills served by more than one railroad.

Q. Mr. Browder, I show you Commission's Exhibit 1183-A and B, and ask you if you are familiar with it at or about the time of the date appearing on it, which is October 5, 1936?

A. Yes. I am familiar with that letter.

Q. And were you familiar with it in October, 1936?

A. That is correct.

Q. Under what circumstances did it come to your attention?

A. Mr. E. F. Stickels, in our office, referred a letter to me that he had received from the Katonah Coal and Feed

Company, and asked for my opinion about the mat-
38200 ters referred to in the letter, and I dictated to him
at least I dictated a letter to him outlining
and those views are incorporated verbatim in this letter.

Q. And that is the letter from Mr. Long to Mr. Dain?

A. That is right. I may say, the letter was also referred to Mr. Cliff Taylor, in our credit department, for another angle that was referred to in the letter from Mr. Dain, of the Katonah Lumber.

Q. Is Mr. Long with the Penn-Dixie Company?

A. No. Mr. Long died in 1936, I believe.

Q. What month?

A. I believe it was in November.

Q. Have you any doubt about that date, Mr. Browder? I would like you to fix it as best you can.

A. No. That is my recollection. I might be wrong.

The witness identified Resp. Ex. 2902 as a letter dated September 22, 1936, from the Katonah Lumber Coal
38201 & Feed Company to which he referred just a moment ago. It is a letter that was referred to him. The witness identified Resp. Ex. 2903 as an office file copy of a letter from Mr. Long to "our" credit manager, Mr. C. T. Taylor, making reference to this same communication, and Resp. Ex. 2904 as a letter from Mr. C. T. Taylor to Mr. Ernest Stickels, dated September 24, 1936, in reply to Resp. Ex. 2903. The witness identified Resp. Ex. 2905 as a letter signed by him, dated September 28th, to Mr. E. F. Stickels, in regard to this letter of the Katonah Lumber Company. The witness further identified Resp. Ex. 2903 as prepared by Mr. Stickels. The witness testified that he was familiar with all of these papers to which he made reference at or about the time of the dates appearing on them and that all of these papers were brought to his attention prior to the time that he prepared the draft of a letter which eventually was sent to Mr. Dain.

38202 (RESP. EXS. 2902 to 2905, inclusive, were offered and received in evidence.)

38205 By Mr. Brick:

Q. Now, Mr. Browder, since you have been with the Penn-Dixie Company, have you experienced any customer claims for loss or damage in transit?

A. Yes.

Q. Are such claims covered by the provisions of your contract order and quotation forms?

A. They are.

38206 Q. Who in your organization, Mr. Browder, handles claims of that character?

A. They are handled under my direct supervision by my assistants.

Q. Now, will you describe the steps which you take in connection with the process of handling claims for loss and damage in transit?

A. Yes. Our cement is sold on a delivered basis, and when the customer advises us that there has been a loss or damage in the cement reaching him, we allow him the credit for the damaged cement, and in turn file our claim against the railroad for the loss or damage, as the case may be.

38207 Q. Now, why does your company handle the claims instead of the customer?

A. Because we sell on a delivered basis, and agreed to deliver him cement in good condition. If it is damaged when it gets to him we understand that is our problem, and not his.

Q. Now, you told us something of the duties of the shipping department, Mr. Browder. Will you now explain the duties of your traffic department?

A. The traffic department, of course, has jurisdiction over all the rates and transportation matters, which include the securing of the necessary tariffs, securing of necessary cars for our shipments, the tracing of shipments, the handling of claims, the preparation of any rate information desired, the checking of freights, freight rates on all of our inbound materials, the furnishing of routes to the purchasing department for inbound materials; the arranging and inserting the routes on all outbound shipments of cement. In addition to that, coordinating the traffic department's work into the sales, and assisting the sales department in many other matters through conference and the direct handling of matters.

Q. What uses do you make of the Institute freight rate books in the traffic department?

38208 The Witness: The traffic department uses The Cement Institute freight rate books in securing all of their rate information unless routings are desired in connection with it.

By Mr. Brick:

Q. And what kind of rate information does the traffic department work up?

A. Why, in our rate work, comparison of rates, and so forth, we make frequent statements of rates from various mills with the distances. We check them to see that we are on the proper basis. We use that many times a day, also in connection with any analyzation of prices that might be referred to us by the sales department, the rate books are used.

Q. Does the traffic department furnish rate information to the sales department in connection with bids on federal work?

A. When they are requested, yes.

Q. And does that include the land-grant rate information?

A. Yes, sir.

38209 Q. Do you refer to the Institute rate books in connection with the determination of land-grant rates?

A. If you are working up a land-grant rate; yes, sir; I would do that, yes.

Q. And will you explain how you do that?

A. Well, you take your commercial freight rate as a basis in determining what the land-grant rate is. The land-grant rate is simply a percentage deduction from certain portions, or from all of the rate involving commercial shipments, and this deduction is given to the Government for land grant reasons.

Q. Does that apply, Mr. Browder, in connection with getting an accurate land grate rate from the line from point of origin to destination includes more than one division?

A. No, you could not secure the land-grant rate from that commercial rate unless you knew what those divisions were.

By Mr. Brick:

Q. And do you have the divisions?

A. No.

Q. Is it necessary for you to use the official tariffs in connection with your reference to the freight rate books in determining the land-grant rates?

38210 A. No, that would not be necessary.

Q. How many employees do you have in your shipping department, Mr. Browder?

A. We have a shipping clerk in each district office, and then a shipping clerk at each mill. In other words, there are two shipping clerks involved in every shipment, but one shipping clerk at the mill serves all of the districts that ship that from that mill.

Q. And how many men do you have in your traffic department?

A. Aside from myself, I have two assistants. I have three assistants, one at Nazareth, one at Chattanooga, and one at New York.

Q. In the event that those departments did not have an opportunity to see the Institute freight rate books, would it be necessary for you to increase your personnel in those departments?

A. Oh, yes.

Q. And will you explain that, please?

A. Well, if we did not have—if we were deprived now of The Cement Institute rate books, we would have to prepare such books ourselves immediately, and that would require quite a large force to prepare them, and then a larger force than we now have to maintain them.

38211 Q. Now, in transporting from hundredweight to barrels, do you follow any particular method with regard to fractions?

A. Yes, all fractions less than a half are dropped, and a half or over are carried to the next unit.

38212 Q. Is that a custom of calculation which was in effect prior to the issuance of the freight rate books by the Institute?

A. Yes.

Q. Do railroads handle their fractions in the same or a different way?

A. They handle them in the same way, where there is any disposition to be made of the fractions or rates.

Q. And under what circumstances do railroads have occasion to make disposition of fractions?

A. They frequently do. For instance, in the last general increase in freight rates they were increased 10 per cent, which made various fractional rates, but they were all disposed of, everything less than one-half was dropped, and all over a half were carried to the next whole unit.

that is, on cement rates, and many other commodities. Many commodities are not published in cents per hundred pounds, and you have a different arrangement for the per ton and per car figures.

Q. Was there a time when railroads did use some fractions?

A. Yes, in connection—

Q. In your experience?

A. In cement rates we had fractions of one-half cent, and during the emergency increase of Ex Parte 115, they had a 7 percent increase which—and they held all the fractions there out to the fourth decimal point. There was no disposition of fractions on that, so that is the exception to the rule.

38213 Q. But there has been a change, then, in the railroad practice of quoting rates in fractions, or using rates in fractions?

A. Yes. In this last 10 percent increase, many of the fractions were disposed of. Prior to that time they had many fractional rates. However, they have always had this rule of disposition of fractions, less than a half, and over, and so forth.

Q. Now, have you, from your experience, found that the freight rate books contain errors in rates?

A. We have found a few, and whenever they were found we requested the Institute to make the correction. There have been very few, however, that we have found.

Q. On the average, about how many do you find, Mr. Browder, in the course of a year?

Mr. MacIntyre: Well—.

Q. Since the books were issued.

38214 A. Personally, I have not found over an average of one a year during the 10 years these books have been in existence. I found about, as I recall it, probably ten during the 10-year period.

By Mr. Brick:

Q. And what did you do by way of seeking corrections, if anything?

A. Either phoned or wrote the Institute bureau in Nazareth to make the necessary correction; called their attention to it.

Q. And were the corrections made?

A. Yes, sir.

Trial Examiner Norwood: That was in the course
38215 of your experience in actually checking rates on shipments?

The Witness: Yes, sir. When I would find an error in the rate book, was checking shipments against the rate book, the rates in the rate book.

By Mr. Brick:

Q. Did you quote any prices calculated on the rates which you found to be incorrect?

Q. Now, you mentioned the correction sheets issued by the Institute in connection with its freight rate book service. Do those correction sheets relate to incorrect rates quoted in the book, or do they relate to something else?

A. They related to the changes in rates which have been made by the railroads. Those rates are being changed from time to time, and as the railroads revise their rates, The Cement Institute revises their rate books through the means of correction sheets. I might say they would, of course, revise any errors that might have been made in the books in the same manner that the correction sheets—in the same manner with the same correction sheets.

38217 Trial Examiner Norwood: Proceed.

I am ready to rule on this stipulation here.

The motion is denied except as to the striking of paragraph 49.

The stipulation states those matters there very tersely in that paragraph 44 to 48, 50 and 51, as to just what kind of trucking they do. I think that statement might go in regardless of its strict relevancy.

Mr. MacIntyre: Well, you notice, did you, Your Honor, that all of that is since the complaint, that entire checking proposition up there started since 1937, as is shown by paragraphs 44 and 45?

Trial Examiner Norwood: I will reconsider that.

Mr. MacIntyre: Everything that follows those two paragraphs, except 49, deals with the matters since the complaint.

Trial Examiner Norwood: I had overlooked that. Is that true of all of those paragraphs?

Mr. MacIntyre: Everything succeeded 44 except paragraph 49 deals with matters subsequent to the complaint.

Trial Examiner Norwood: Well, I will reconsider that.

38218 Trial Examiner Norwood: I should restate that. The motion is denied as to striking paragraphs 2, 6, 8, and 14 of the stipulation, and is allowed as to striking paragraphs 44 to 48, paragraph 49, paragraphs 50 and 51.

By Mr. Brick:

Q. Mr. Browder, after quotations have been sent out by your sales office, what, if any, occasion arises for salesmen to figure prices?

A. Well, occasionally the salesman goes into a dealer's office, and the dealer wants quotations at some nearby points where quotations have not been mailed, and in those cases the salesman would figure the price for the dealer, give that to him subject to confirm by the district office. He would then report that back to the district office and the dealer would receive the confirmation.

Q. Are the quotations sent out by the sales offices limited to the points where the dealers have their warehouses?

A. That is right. It is to the dealer town, that we mail periodical quotations, and, of course, then we also quote the contractors on such jobs as are pending at the time.

38219 Q. Are all orders received from salesmen's territory taken personally by the salesman from the dealer?

A. No. Only a few of the orders are personally taken by the salesman. The salesman makes his call on the dealer, and tries to serve him in all the ways he can, and get his good will, so the dealer will send in his orders direct to the company when he is in need of cement. It is awfully hard for a salesman to be at a certain town just the time the dealer needs the cement.

Q. Now, when salesmen figure prices and quote them for the points not covered by the quotations sent out by the sales office, are such quotations made by the salesmen final?

A. No. As I say, they are subject to confirmation. He gives the dealer information as to what he understands it to be, and it is subject to a confirmation by the district office.

Q. Now, through your stipulation, Mr. Browder, you have testified that the Pennsylvania-Dixie Company obtains its information concerning competitors' prices from the trade generally, and from the work of the salesmen in

the field. Do you have any other means of obtaining such price information?

A. No, except occasionally there will be some mention in the—as a news item—other than that there is not. It all comes from the field.

Q. And do you have any other source of information for determining whether a mill is a base or a non-base mill?

38220 A. No.

Q. Or whether a price base has changed?

A. No.

Mr. MacIntyre: I just want to point out that this is duplicating the stipulated testimony almost precisely.

38221 Trial Examiner Norwood: Are you showing some sources of information to prove that there are no other sources?

Mr. Brick: Well, now, it is difficult to answer that question "yes" or "no."

Trial Examiner Norwood: Well, to render it improbable?

Mr. Brick: That is right, yes. That is, after all, the Government relies circumstantially on prices being the same; therefore, there is collusion. Now, we want to explain where the information concerning prices comes from, and the actual operations that take place between the field and the executive officers in connection with the changes.

Trial Examiner Norwood: Well, I think we have that general subject, and I have permitted a great deal of correspondence and numerous quotations, and all that,
38222 to come in for illustrative purposes, and unless these contain some different features other than that they are simply the quotations of another company, I think I should exclude them.

Mr. Brick: Well, they are different in this respect, Judge. First of all, these cover every price change at Atlanta over the period of this man's employment with the Penn-Dixie Company, and I have also available the files of the company prior to Mr. Browder's association with the company, and they cover every change that has been made. It is different from a mere illustration that this is the way we get our information, and this is the kind of quotation we pick up in the field. That is, I want to support our position that this is the sole means of the

company getting their information, and in every case where they do make a price change, or make any kind of a change in meeting a change in market conditions, that that is predicated on the information picked up from the trade and from the salesmen operating in the field.

Trial Examiner Norwood: Wasn't that to avoid that that we entered into this stipulation?

Mr. Brick: Well, I do not know that that point would be conceded by the Government, we would not have to bother about it if they did, but I could not refer to
38223 exhibits in the stipulation, Judge.

Trial Examiner Norwood: Go ahead and have them marked.

Mr. Brick: I suggest that we give them one number and letter all the papers. In that way we won't take up as much time.

Mr. MacIntyre: I object to the taking of the time in this hearing room by following this procedure on the ground it is immaterial, and I cite as a ground for the immateriality the record page 38041, lines 17 and following, and page 38043, lines 19 and following.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

(The documents were marked for identification "Respondents' Exhibits 2906-A to 2906-Z-206.")

By Mr. Brick:

Q. Mr. Browder, is it the practice, or is it not the practice of your company to all sales memoranda passing between district offices and the home office to pass over your desk?

A. As to price changes, yes.

The witness identified Resp. Ex. 2906-A to Z-206 as papers with which he was familiar and as papers which passed over his desk in the regular course of busi-
38224 ness in connection with the price changes which are the subject of the communications contained in these exhibits. These papers represent all of the memoranda which passed between his district sales offices and his main office in connection with prices changes as to Atlanta between May 1931 to 1938. This file represents the information which was passed along from salesmen operating in the field to district offices and the home office and

vice versa. The witness stated that there is such information relating to each of the changes occurring within the period.

38225 The witness testified that this group of papers included in Resp. Ex. 2906-A to Z-206 include communications passing between the district sales offices and between district offices and salesmen for the following price changes: May 14, 1931; January 4, 1932, June 6, 1932; July 22, 1932; August 10, 1932; December 13, 1932; July 7, 1933; October 2, 1933; June 4, 1935; January 2,
38226 1937 and November 22, 1937. The witness testified that there were no occasions during this period where the price to dealers at Atlanta was changed other than on the dates mentioned.

Mr. Brick: I offer for the purpose I formerly mentioned Respondents' Exhibits 2906-A to Z-206 (handing the documents to Mr. MacIntyre).

Mr. MacIntyre: This offer is objected to as incompetent, irrelevant, and immaterial, and also on the ground as cumulative.

Trial Examiner Norwood: The objection is sustained. Proceed.

Mr. Brick: If your Honor please, I have another file covering the same type of papers evidencing the action
38227 taken by the Penn-Dixie Company with regard to all of the price changes occurring at Atlanta between May 3, 1929, and March 2, 1931. Now that period was prior to the association of Mr. Browder with the Penn-Dixie Company so I will have to have them identified in a different manner, but I ask that the Reporter mark them with one number A to blank, and in two or three questions, I can make my offer.

Trial Examiner Norwood: I think if they are the same kind of documents the exception on the first quantity will be all that the counsel needs.

Mr. MacIntyre: They are all the same type, aren't they, Mr. Brick?

Mr. Brick: Well, they cover the same situation. As I said, they evidence the communications passing between the Penn-Dixie officials and salesmen with regard to each of the price changes which was affected at Atlanta during the period I mentioned.

Trial Examiner Norwood: Just another period, isn't it?

Mr. Brick: Of course, the purpose for which I am offering it is to establish that the evidence concerning these changes all came from the field, and that in every case these papers support that position, not only to this group, but as to the other group.

Trial Examiner Norwood: Go ahead.

38228 Mr. Brick: I think, if Your Honor please, in order that the record may be correct, I should state the price changes for that second group, which would be covered. It will only take a half minute. That would be May 3, 1929, August 21, 1929; September 5, 1929; November 25, 1929; November 11, 1930; December 29, 1930; January 27, 1931; February 4, 1931; February 6, 1931; February 13, 1931; March 2, 1931.

Trial Examiner Norwood: Proceed.

By Mr. Brick:

Q. Mr. Browder, after the Penn-Dixie Company advances its prices, what has been your experience with respect to the length of time from the effective date of the advance before you receive the full benefit of the advanced price?

Mr. MacIntyre: That is objected to as irrelevant and immaterial.

Trial Examiner Norwood: We have permitted a great many of the Respondents to testify to that.

Mr. Brick: It is only one answer, and the situation is different with regard to different companies.

Trial Examiner Norwood: Well, I think it is one answer too many. How does it bear on the issues, anyway? We are going to have to be a little more particular from now on, because we have taken a great deal of time. Just how is it relevant and material?

38229 Mr. Brick: Well, may the question be read?

Trial Examiner Norwood: As to how long he waits before he begins to get the benefit of a price raise, just where does it come in?

Mr. Brick: May the question be read? I do not think Your Honor understands it.

(Question read.)

Trial Examiner Norwood: How is that relevant or material?

Mr. Brick: Why, with regard to changes in prices. It is very important from the standpoint of the seller as to how long he will have to wait before he gets the benefit

of an advance, as has been explained by some of the witnesses. It often takes as long as nine months, sometimes a year, sometimes a year and a half.

Trial Examiner Norwood: I am trying to find out how that makes any difference whether it is a long time or a short time. How does that make any difference with respect to the issues in the case here?

Mr. Brick: Well, I think it has a lot to do, Judge, with the intent, the purpose and conditions which a seller must have in mind when he does either continue a price in effect or change the price.

Trial Examiner Norwood: The objection is sustained.

Mr. Brick: I offer to prove that on the basis of
38230 the experience of the witness Mr. Browder, that the length of time which it takes for his company to receive the benefit of a price advance depends upon the particular market where the price change is effected and the number of contracts which are outstanding in that particular market, and that in his experience he would estimate that it requires some five to eighteen months before his company realizes the full benefit of an advance in price.

Trial Examiner Norwood: Go ahead. We have had all that explained to us fully and completely.

Mr. Brick: Not by this company.

Trial Examiner Norwood: How the extending of contracts, a given price, take up so much volume, and so forth. There is nothing about that that has not been clarified.

Mr. Brick: Nobody has spoken on behalf of Penn-Dixie, Judge.

Trial Examiner Norwood: Yes, I know that.

Go ahead.

38232 Q. Mr. Browder, has your company had any problem with respect to diversions of cement by your customers from origin and destination point to some other point?

A. Quite a bit of problem.

38233 Q. Under what circumstances does that problem arise?

A. Well, that problem arises oftener when there are lower prices along the Coast to meet foreign cement competition than at any other time.

Q. And does your company have any policy with respect to such diversions?

A. Yes, we do not permit diversions.

Q. How long have you had that policy?

A. Ever since the company was formed in 1926.

Q. Now, what is the basis for that policy, Mr. Browder?

A. Well, the basis of the policy is that it disturbs our customers when cement is diverted. It is generally done to secure cement at the final destination at a lower price than our regular market price at that point, and when a dealer from one place is able to do that at another place, he disrupts the business of the dealers there to whom we are selling and to whom we are trying to give protection. Not only that, but deprives us of the revenue that we would secure had we initially made the shipment to the final destination.

Q. Do you have any problem with regard to diversions other than those which are made in transit?

A. Yes, we have at times of a price increase, we have quite a problem of contractors and dealers who secure protection on specific jobs, using the cement supposedly purchased for those jobs in other and newer work and through the dealer's warehouse.

38234 Q. Now, how do you make that policy effective?

A. Well, we place in our contracts and orders a provision which provides that that cannot be done, the cement cannot be diverted.

In addition to that at the present time we are putting a stamp on our bills of lading which prevent the railroads from making that diversion except with our permission, and to prevent the diversions at times of price increases from the old price contracts to newer work we just simply have to check up on it through our sales representatives, salesmen on the job.

The witness identified Resp. Ex. 2907 A to Z9 as original contracts issued by Penn-Dixie from January 1928 to the present time. The actual contracts run from the period from January 19, 1928 to July 11, 1936. The additional forms are copies of the contract forms which Penn-

38235 Dixie has used since that date. Each of these contract forms contains a provision concerning diversion.

These documents do not show on what date one went out of use and the other one succeeded it. It can be determined from the documents when this form was not in use, the next one was. But the date on which the change was

made is uncertain. The only thing that can be determined is the fact that they were in effect on the date that the contract is shown to have been executed, where there are executed contracts, except that they are contracts that were in effect on dates between January 19, 1928 and the present time. Without any further testimony a given contract can only be determined to have been in effect
38236 on any particular date by referring to the date on which a contract was executed as is shown on the form.

Examination by Trial Examiner Norwood: These contracts are not all on the same forms and blanks. They are on different forms. There is one on each different form that has been in use ever since the date named by the witness.

By Mr. MacIntyre:

Q. Can you tell me whether or not that any of these came into use by your company on any different date than a specific job contract form came into use exactly like it by one of your competitors or by more than one of your competitors?

Mr. Brick: I object to that, if Your Honor please. I do not think that has anything to do with the proof of the papers. That is entirely collateral to the point of determining whether the papers are authentic.

Trial Examiner Norwood: Well, it might determine its relevancy.

Mr. Brick: Well, they are relevant on their face.

Trial Examiner Norwood: Overruled.

38237 The Witness: What is the question?

Trial Examiner Norwood: Read it.

(Question read.)

A. No, I cannot answer that.

By Mr. MacIntyre:

Q. Do you know any one of the provisions in any one of those forms to be any different from the similar provisions in the contract forms used by your competitors?

Mr. Brick: Same objection, if Your Honor please.

Trial Examiner Norwood: The objection is overruled.

A. I have never read one of our competitors' contracts. I do not know what they have in theirs.

Mr. MacIntyre: The offer is objected to as incompetent, irrelevant, and immaterial.

Trial Examiner Norwood: Is this offered on the ground that it is different forms from those used by the competitors at the time, or not?

Mr. Brick: In some cases the provisions are different and in some cases they are the same, and I think by the time we have the record closed there will be explanations of the reason why some are the same and others are different, and I think that very necessary on the issue as to whether or not the Penn-Dixie Company was engaged in restraining competition in price. That is, we must know terms under which it has sold its product, and that
38238 question can only be determined from the contracts which it has used. I do not see anything could be more material.

Trial Examiner Norwood: Well, I will receive it subject to the counsel's statement there.

Mr. MacIntyre: May I make a further objection, if Your Honor please?

Trial Examiner Norwood: Go ahead.

Mr. MacIntyre: If they are offered to show difference, they are incompetent because it is not established as to whether or not they were used even over the same period as to particular competitors' contract forms, therefore, they could not be used to show differences. If they are offered to show the same thing, they would be immaterial because they would not add anything to the proof of the Commission's case or to what the defense has already been shown to be the case.

Trial Examiner Norwood: Well, if there are differences, it shows it, and if there are no differences it does not hurt you.

Mr. MacIntyre: But the dates of use are not shown, therefore you could not argue for the benefit of the Respondents that they are different from a particular time from the competitors, because you do not know when, whether it was January or November of any particular year. That is the basis of my objection as to the
38239 incompetency for the purpose of making such a showing.

Trial Examiner Norwood: Counsel for the Respondents say that they are different in some cases, and he proposes to show that difference and explain, so I am admitting it subject to that undertaking by the Counsel. If he does not show that I will entertain a motion to strike that.

Mr. Brick: Well, there are other contracts in the record from other companies, and by comparing them, that is quite obvious also. We do not limit our offer in any way. We offer it for all the facts indicated on the papers.

Trial Examiner Norwood: Received as marked.

(RESP. EX. 2907-A to 2907-Z-9 was offered and received in evidence.)

28240 By Mr. Brick:

Q. Mr. Browder, has there ever been any agreement or understanding between Penn-Dixie and any of its competitors with respect to the use of any diversion clause or any other of the provisions in these various forms which are included in Respondents' Exhibit 2907-A to Z-9?

A. No.

Q. Now, in connection with these diversions, of which you have spoken, Mr. Browder, how do you learn of them if and when they occur?

A. We learn of them through the dealer into whose territory the shipment is diverted.

Trial Examiner Norwood: Don't you learn it on the freight bill, too?

The Witness: No, sir, Judge; you don't get the freight bill back.

By Mr. Brick:

Q. You mean by that, Mr. Browder, that it is not
28241 the practice of the Penn-Dixie Company to have customers present their freight bills in cases where the customer has paid the freight?

A. We tried to get them to do that, but we never succeeded.

Q. And that is what you had in mind when you answered his Honor's questions?

A. That is right. We do not get the freight bills.

Q. Now, how do you learn of diversions with regard to specific job contracts which you previously referred to?

A. Well, we learn of those in several ways. Sometimes if a dealer in a town is using cement, low-priced cement, which he is securing on an old contract, the other dealers in the same town will many times tell you about it and want you to do something about it.

Another way we have of finding out about that is to have our salesmen keep in close touch with every job he has in

his territory to see that the cement which we ship on that low price contract actually goes into the job.

Q. Do the salesmen make regular progress reports with regard to jobs in their territory?

A. Yes. We have a regular progress report form that the salesman is supposed to fill out every time he goes to the locality of a job that we are furnishing cement on, and that report is supposed to show the amount of concrete which has been poured on the job and such other in-
38242 formation as he can get from the contractor at the time of his call.

Q. Now, upon receipt of the salesman's report, such as you have testified, does the sales department take any steps?

A. Yes, we check up on those reports; that is, if there has been a price increase where we are interested in this feature, and if we find that the progress report does not check up with the cement we have been shipping out to the job, why, then, we go into it very throughly to find out what has been becoming of this cement.

Q. And when you get a report in your traffic department, your shipments have been diverted in transit, what do you do?

A. Why, we file a claim against the railroad for the difference in the price at the point to which the shipment was originally billed, and the price at the point to which it was finally delivered.

Q. Is that—that is, your company prepays freight, or otherwise?

A. Well, it makes no difference. We do it whether we pay the freight or do not prepay the freight.

Q. And are you, as a matter of practice, successful in pressing your claims against the railroad?

A. We have not had many of those, but we have collected every one that we filed so far.

Q. Now, you mentioned that you placed a stamp on your bills of lading which assists you in preventing
38243 diversions in transit. What is the language of that stamp, Mr. Browder?

A. It is substantially this, that "This is the property of the shipper, and cannot be diverted or reconsigned without the written consent of the consignor."

Q. How long has Penn-Dixie been using such a stamp on its bills of lading?

A. Since May, 1935, I believe.

Q. Now, I show you, Mr. Browder, Commission's Exhibit 584-G, which is a letter by you, to certain traffic executives of different cement manufacturing companies, and ask you if the clause referred to in that letter in quotations is the one which you placed upon your bills of lading?

A. That is correct. That is the clause.

Q. Do you recall having written that letter?

A. Yes.

Q. What is the date of that letter, Mr. Browder?

A. December 18, 1935.

Q. Now, you state in that letter that you had been using the stamp in the East since the middle of May. Under what circumstances did you begin the use of that stamp on your bills of lading?

A. Well, we were advised by the L. & N. E. Railroad that the Association of American Railroads had passed a resolution that would permit such a stamp to be placed on the bills of lading. We decided that we would place

38244 such a stamp on our bills of lading and took it up with the other lines on which our mills in the East are located; that is, the D. L. & W. Railroad. They told us their understanding was that that clause was to be permitted only on shipments of iron and steel, and that the freight traffic managers committee would meet shortly after that and decide whether it could be used on other shipments. Immediately after this freight traffic managers—that is the railroad freight traffic managers committee—I again took it up with them and understood that they had approved this stamp for any shipments that might be made over their lines, and, therefore, we began using it as soon as we got that advice.

Q. Well, you say any shipments which might be made over their lines. Do you refer to any commodities?

A. Yes, as I understand it, it can be placed on any bill of lading.

38245 The witness identified Resp. Ex. 2908-A to F as papers relating to the circumstances under which Penn-Dixie adopted the use of the diversion stamp which he mentioned: Resp. Ex. 2908-A as a letter from his assistant in Nazareth sending him a copy of a circular issued by the general freight agent of the Lehigh and New England Railroad with reference to the use of this notation on the bills of lading; Resp. Ex. 2908-B as the railroad communication; Resp. Ex. 2908-C as the witness' letter to "our" vice president, Mr. Wing, with regard to this asking if he

desired to have this stamp placed on "our" bills of lading:
Resp. Ex. 2908-D as Mr. Wing's reply stating that he
38246 does. Resp. Ex. 2908-E as his letter to the three rail-
roads on which "our" mills are located relative to the
matter. Resp. Ex. 2908-F as a letter from his assistant to
"our shipping departments at the mills relative to the
stamp.

38247 Q. Now, in connection, Mr. Browder, with Re-
spondents' Exhibit 2908-E, will you explain the cir-
cumstances under which you wrote that letter to the
railroad?

A. I wrote this letter to the railroads putting them on notice that we were placing this stamp on our bills of lading, and would expect them to make the necessary provisions for honoring the stamp.

Q. And what was the date of that letter?

A. That is May 24, 1935.

Q. In arriving at your decision to use the stamp and requesting the railroads to honor it as stated in Respondents' Exhibit 2908-E, did you have any agreement or understanding with any of your competitors on any matters relating to the use of that stamp?

A. No.

Q. Will you now explain, Mr. Browder, the circumstances under which you wrote that letter of December 18, 1935, to traffic managers of other cement companies, that document being Commission's Exhibit 584-G?

A. Well, after putting the stamp on the bills of lading at the mills in the East, we found that it did have the de-
sired, that is, it prevented diversions. We were then
38248 determined to put it on our bills of lading in the
South where we have had a particularly lot of trouble, and I had been working in the South and was familiar with the many difficulties we had down there, and I wrote this letter to the officers of other companies advising them of the stamp in the hopes that they would use it; in other words, their diversions, diversions of their shipments worried us almost as much as the diversions of our own shipments in that whenever cement, whether it is our cement or anybody else's cement, would go into a dealer's town at a lower price than he could buy it, then he would get after us to do something about it, and it worried us as much as our own diversions did.

(RESP. EX. 2908-A to 2908-F was offered and received in evidence.)

38249 By Mr. Brick:

Q. Mr. Browder, did you have any agreement or understanding or arrangement with any of the traffic managers or representatives of any other cement manufacturing company in connection with the use of this bill of lading stamp either before or after you wrote your letter of December 18, 1935?

A. No.

Q. Mr. Browder, did you attend a committee on transportation of the Portland Cement Association in May, 1935?

A. Yes.

Q. Did you make any mention at that meeting of the railroads permitting the use of this bill of lading stamp which we have discussed?

A. Yes.

Q. Will you explain the circumstances of the situation and what you had to say about it?

A. Well, the mention of that particular fact was just in informal discussion and not as a part of that meeting of that committee, just discussing things of interest in the traffic and transportation field. I brought up this subject of the stamp being placed on the bills of lading.

Q. How long after you first heard of the railroads permitting the use of such a stamp did this meeting occur?

A. As I recall it, it was rather shortly after I heard it, the meeting was in about—

38250 Q. Was there any arrangement, understanding, or agreement among any of the cement representatives attending that meeting with regard to whether or not they would use the bill of lading stamp?

A. No.

Q. When you left that meeting, did you know which companies would be using it and which would not?

A. No.

Q. Was there any other discussion concerning the subject at that meeting?

A. Not that I recall, that I just recall discussing it in an informal way there as a matter of interest.

Q. Did anybody connected with the Penn-Dixie Company, Mr. Browder, have anything to do with securing the railroad consent to use such a notation on the bill of lading?

Mr. MacIntyre: That is objected to as calling for incompetent testimony.

Trial Examiner Norwood: Read the question.
(Question read.)
Mr. Brick: I believe the objection is well taken.

By Mr. Brick:

Q. Apply that question, Mr. Browder, to yourself.
A. No, not initially. I had nothing to do with the initial authorization of the Association of American Railroads to permit that on bills of lading.
38251 Q. Do you know whether anybody connected with your company did?
A. Not to my knowledge.
Q. Now, in connection with the shipments from your eastern mills, am I correct in understanding that you have used the stamp on the bills of lading on shipments from these mills prior to May 25?
A. No, not—
Q. 1935?
A. No. That was the beginning of the time that we put them on the bills of lading.
Q. And that applied in the East?
A. Only in the East; that is right.
Q. In connection with the Committee on Transportation, which we referred to, Mr. Browder, what was the activity of that committee?
A. Well, there was very little activity of the committee, and due to that fact it has since been abandoned; in other words, we could only handle transportation or traffic matters involving the whole United States. We could not handle any sectional matters at all.
Q. Now, in connection with Commission's Exhibit 584-G, Mr. Browder, which was your letter to traffic representatives of other cement companies, dated December 18, 1935, where did you gain your information relating
38252 to your statements in that letter that the stamp had been used on shipments moving in the East?
A. From the railroads, I understood that only cement companies in the East were using it.
Q. And then you subsequently adopted the use of that stamp for your Southeastern mill?
A. After we found it worked successfully in the East, yes.
Q. And did you do anything about it in connection with your West Des Moines plant?
A. Yes, we put it in effect in the West, too.

Q. And when did you institute the practice there?

A. Shortly before we put it in in the South. I think it was along in August we put it in out there.

Q. Had you had much trouble in connection with diversion on shipments from your West Des Moines mill?

A. No, there had been very few there.

Q. Do you know whether any company used the bills of lading stamp prior to May, 1935?

A. I do not know whether they did or not.

Q. What had been the practice of the railroads prior to the time that they gave permission to shippers to use that stamp on bills of lading?

A. They would make diversions and reconsignments, either on the request of the shipper or on request of the consignee.

Q. Was there any way at that time which you
38253 could prevent diversions being made on the request of the consignee?

A. No.

Q. Why hadn't you placed such a stamp on bills of lading prior to the time that the railroads gave this particular consent?

A. The railroads would not accept a bill of lading with that notation or any other notation on the bill of lading.

Q. And under what authority did the railroads take that position?

A. I understand that under the Bill of Lading Act you cannot put provisions in the bill of lading that are not satisfactory to the railroads. You can put only the provisions in there that they authorize.

Q. Has it been your experience that diversions have or have not taken place since you have used this bill of lading stamp?

A. On our shipments there have only been about four diversions since we have started placing the stamp on the bills of lading.

Q. And what did you do in those cases?

A. We filed claims against the carriers and collected it.

Q. You collected the claims?

A. That is right.

38254 Trial Examiner Norwood: What kind of claims, and what was it based on? Claims for damage?

The Witness: Claim for damage, that they had not fulfilled the provisions of the contract which said they

would not divert it, and they did divert it, and we filed a damage claim for the difference in the price between the low rated price and the final delivery price.

By Mr. Brick:

Q. Do you communicate with your customers in connection with diversions that you find them making since you have used the bill of lading stamp?

A. Yes. In those cases we did. We advised them that we would not permit it, and in two cases, I know, we sent them corrected invoices based on the higher price, but they did not pay those invoices; but we do tell them that we won't permit it, and advise them that we filed a claim against the railroads for it.

Q. And what change, if any, has taken place with regard to the attitude of the railroads concerning diversions?

A. Well, they are now living up to their contract, and, as I say, there are very few of them now. They have no objection to that clause, and they live up to it.

Q. Mr. Browder, there is evidence in the record to the effect that you participated in efforts to secure reduced freight rates to South Atlantic and Gulf ports. Did
38255 you participate in any such movement?

A. Yes.

Q. Will you describe the situation which prompted that activity, and tell us what you did about it?

38256 A. Yes. Early in 1935, there was a particularly low price in at Miami, Fla., to meet the competition of foreign cement. The various cement companies started making shipments of cement to Miami by water. The Florida Cement Company was making shipments from Tampa; the companies who have mills in the Birmingham district were making shipments through New York from their Lehigh Valley plants, and the mill at Martinsburg, W. Va., was making shipments through Baltimore by water to Miami, and the water-and-rail rates that they used were less than the through rail rates from the nearby mills in Birmingham, and these other points. The Seaboard Airline Railway desired to meet that competition, or were the first that tried to meet the competition, and filed a request with the Florida Public Service Commission to reduce the rate from Tampa to Miami from 19 to 11 cents. Mr. H. E. C. Hawkins, who is the chief traffic officer of the Florida East Coast Railway, advised me of

this hearing two days before it occurred in Tallahassee, I got a train and went to Tallahassee, and when I got there on the morning of the hearing I found that there were representatives there from practically all of the other cement companies.

I took the position at that hearing that the Florida Commission had nothing to do with the rate from Tampa to Miami, due to the fact that it had been brought up 38257 in a Thirteenth Section complaint, and was under the jurisdiction of the Interstate Commerce Commission.

I also took the position that no reduction should be made in the rates from one point without similar reductions from other points where similar conditions exist.

It was finally agreed that that was the case, and the Florida Commission took no action.

After the hearing was over we discussed this matter with the railroad representatives who were there, and I learned that the following day in Atlanta the traffic executives of the railroads in the South were holding a meeting, and Mr. Hawkins of the Florida East Coast Railway suggested that I go over and attend this hearing and try to make myself heard there, although this question had not been docketed. So I went to Atlanta and discussed the matter informally with the chairman of the committee over there and several railway officials. They requested me to make a written statement of the facts I had told them there and come prepared at their next hearing to present the matter orally to them. This we did, or at least this I did, and at that time, at the next hearing, as was the policy of the railroads at that time in requesting one shipper to present the matter for all shippers who had a common request to make in the interest of saving their time, I acted as spokesman for all the cement companies who were interested in that matter, and got the matter 38258 up to the railroads, and they finally agreed to make a reduction in the rates from all producing points shipping into Miami, of about 30 percent.

In addition to that, the railroads had to file a fourth section petition with the Interstate Commerce Commission so as not to observe these low rates they were going to put into Miami to the intermediate points, and they requested me to prepare for them that part of the petition which would relate to the competitive features between the vari-

ous companies. I prepared such a statement and sent it to Mr. J. E. Tilford, who was chairman of the Southern Freight Association, and he incorporated that report in his petition to the Interstate Commerce Commission.

When the matter came up before the Interstate Commerce Commission I attended that hearing and again at that time spoke for all of the cement co. panies who had the same views, and that is the request of the Interstate Commerce Commission, that one spokesman be appointed or selected to handle the matter for all of the shippers who have the same,—are of the same view; in other words; we were conserving their time and the time of the hearing, and this rate was put in.

Now, it went further than that. The railroads advised us at the same time that these other ports, that something should be done there, but that they did not want to consolidate that with this Miami situation which, to them, was very acute. Therefore, we handled the other southern ports as a separate matter. We went through the
38259 same procedure with the railroads relative to the rates to Wilmington, Charleston, Savannah, Jacksonville, Pensacola, Mobile, and Port St. Joe, and Panama City, Fla., I believe. We went through the same procedure, and went to the Interstate Commerce Commission, but there was no movement of cement to these other ports by water as there was in the case of Miami, and therefore the Interstate Commerce Commission on those grounds refused to permit the railroads to put in reduced rates to the ports without making reductions to the intermediate points. This the railroads refused to do, and no reductions were made to any points except Miami.

By Mr. Brick:

Q. Mr. Browder, what occasioned the delivery of cement by barge to Florida? I think you mention it had been shipped by barge from New York and other Coast points.

A. Yes. The total transportation cost by water was less than the all-rail rates from the inland mills to Miami.

Q. And did the importers of cement in Florida sell from the barges at the docks.

A. No, not from the barges. They stored it in the warehouses there and sold it; in some places the warehouse was on the docks.

Q. And did the domestic manufacturers, who shipped

down to Florida also store their cement in warehouses?

38260 A. Yes.

38261 Q. Mr. Browder, I think you made an indirect reference to a document prepared by you, under date of September 28, 1935, of which I believe—I believe it is Commission's Exhibit No. 516-A to D. I ask you now if you referred to that document in connection with your testimony?

A. That is the document I prepared.

Q. Will you state the circumstances under which you prepared that document?

A. Yes. As I stated, I was requested by the executives of the railroads in the South to submit to them this information for incorporation in the fourth section application to the Interstate Commerce Commission.

Q. That was the railroads' application, was it not?

A. That is right.

Q. And you prepared it at the request of the railroads?

A. That is right.

Q. I show you, Mr. Browder, Commission's Exhibit 514-C through F, and ask you if you know the circumstances under which that document was prepared?

38262 A. Yes. At the same time that the railroad executives asked me to prepare that memorandum relative to the commercial situation at Miami, they asked Mr. E. S. Gubernator of the Lehigh Portland Cement Company to prepare a similar statement outling fully the situation as to the movement of this cement by water through New York harbor to Maimi, and Mr. Gubernator prepared a statement, and this is the statement that he prepared, and I was furnished with a copy of it.

Q. While you made reference to the request for Mr. Gubernator to prepare a statement for the railroads being similar to a request made to you by the railroads, did you refer to the paper which you prepared, being Commission's Exhibit 516-A through D?

A. That is correct. The request was made on Mr. Gubernator and I at the same time for these two sets of information.

Q. Mr. Browder, in connection with these various proceedings concerning the rates and adjustments were all of the cement companies in the same position?

A. Yes. There was no difference of opinion between the various cement companies as to those rates.

Q. And was there any difference among the railroads?

A. Not in the final outcome; in other words, their approval must be unanimous or the rates cannot go in; and they approved it.

Trial Examiner Norwood: Did these water ship-
38263 pers from the eastern mills resist that?

The Witness: Yes.

Trial Examiner Norwood: Resist that lower rate?

The Witness: No. There was no objection on anybody's part at the hearing.

Trial Examiner Norwood: The whole thing was to enable these central mills to participate in that business, was it?

The Witness: Well, it was principally to permit the railroads to haul the business rather than boat lines. The railroads were losing the business and the railroads wanted to regain that business.

Trial Examiner Norwood: And the cement companies who were suffering from this rate did not initiate this at all?

The Witness: No. They were still getting the business, Judge, but, for instance—

Trial Examiner Norwood: Getting it at a lower mill net, weren't they?

The Witness: No. They were getting it at a higher mill net than they would get if they shipped it—for instance, ourselves, from Clinchfield, or the Lehigh Company from Boyles, or the Alpha Company from Phoenixville, they would ship from the mills in the Lehigh Valley and get more money by shipping by water than if they
38264 shipped it from Birmingham, and so forth, mills. The rail rate was so high.

Trial Examiner Norwood: Weren't the mills down in the Birmingham section, down in there, losing?

The Witness: No, the same company was getting the business.

Trial Examiner Norwood: Aren't there some other mills down there?

The Witness: There are some other mills; they were not losing any business. They had to ship from their mill, but only the business that those other companies got, they would ship from their eastern mills.

By Mr. Brick:

Q. Mr. Browder, I show you Commission's Exhibit 586-4-L through M, and ask your if the documents contained in those exhibits were prepared by you?

A. Yes. These were prepared by me at the request of the railroads.

Q. And where did you obtain the prices which appear on those papers, Mr. Browder?

A. From our files, Penn-Dixie files.

Q. What kind of documents did you have in your files which would be a source of that price information?

A. Why, we had this information in several forms. Of course, in our organization, we had the town cards
38265 showing the prices, and we had it in our office memorandum as to base prices.

Q. Now, are these all destination prices?

A. No. The destination prices are those shown in the top of Exhibit 586-4-L, the price shown in the lower were the base prices which are established for points in the interior.

Q. And were those prices based at mill?

A. No, they are at the South Atlantic and Gulf ports.

Q. And you referred in that connection to Charleston, S. C., Jacksonville, Miami, Mobile, New Orleans, Panama City, Pensacola, and Port St. Joe.

A. That is correct.

Q. And those are the ports at which there were price bases.

A. That is right.

Q. Now, tell us about the prices appearing on Commission's Exhibit 586-4-M. Where do they come from?

A. There is no price on these, 586-4-M and N, they are the statement of rates and nets, mill nets which the various mills would secure at the points at the ports, and it shows also the proposed amount of reduction that we had requested there.

Q. Now, was it the information contained in Commission's Exhibit 586-4-L through 4-N which you required for the preparation of your statement, which is Commission's Exhibit 516-A through D?

A. No. That is, this Commission's Exhibit 516-A through D covers the first adjustment which we
38266 handled covering Miami, Fla. only. The papers 586-4-L through N cover the second handling, which

cover the other South Atlantic and Gulf ports other than Miami. They involve two different matters.

Q. And were all of those documents prepared, Mr. Browder, at the request of the railroads?

A. Yes.

Q. Mr. Browder, I show you Respondents' Exhibit 2909-A through C, and ask you to identify them.

A. Respondents' Exhibit 2909-A is a letter addressed to me by the chairman of the Southern Freight Association, under date of January 2, 1937. Respondents' Exhibit 2909-B is a letter which I addressed to the traffic representatives of the other cement companies upon receipt of Chairman Tilford's letter; and Respondents' Exhibit 2909-C is a file copy of my letter of January 6, to Chairman Tilford in reply to his letter of January 2 to me.

Q. I ask you if you forwarded Commission's Exhibit 586-4-L to N in response to that letter,—part of it?

A. This Exhibit 586-4-L to N was prepared for submission at this hearing referred to in Chairman Tilford's letter, and which had been requested at a previous hearing on the same matter.

38267 Q. I show you, Mr. Browder, Respondents' Exhibit, for identification, 2909-D through G, and ask you if those are the cards to which you made reference in obtaining the prices which appear on Commission's Exhibit 586-4-L?

A. That is correct. I took those prices from my office records and checked them against these cards before submitting that statement to the railroads.

38269 (RESP. EX. 2909-A to 2909-G was offered and received in evidence.)

By Mr. Brick:

Q. Mr. Browder, do you have cards such as those contained in Respondents' Exhibit 2909-E through G, for each of your dealer accounts?

A. Yes to every dealer account we quote we have such cards.

Q. And whenever you change a price is the price noted on those cards?

A. That is right, every quotation that is sent out.

Q. And do delivered prices appear on those cards?

A. That is correct.

Q. And that applies to all of your cards for all of your dealers?

38270 A. That is right.

Q. Mr. Browder, have you ever had any agreement or understanding with any of your competitors as to what action your company would take or what action any competing company would take in connection with rate matters?

A. No.

Q. Under what circumstances have you acted for companies other than Penn-Dixie in connection with rate adjustments or hearings before railroads or before the Interstate Commerce Commission?

A. Why, I have simply explained the position I was going to take in this rate matter to the representatives of other cement companies. If they said their position was the same as mine, I spoke for that group. The others who were not of the same mind handled the matter for themselves.

Q. And does that apply in connection with all of the rate hearings in which you have acted for companies other than your own?

A. Yes.

Q. And is this general practice requested by the railroads?

A. Yes.